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Chancery Commission.

COPY OF THE

REPORT

MADE TO

27243

HIS MAJESTY

BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE

PRACTICE OF CHANCERY.

(Presented pursuant to Address dated March 2d, 1826.)

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GEORGE THE FOURTH, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, TO Our right trusty and right well-beloved Cousin and Councillor, *John* Earl of *Eldon*, Our Chancellor of Great Britain, and Our Chancellor, Lord Keeper and Commissioners of Our Great Seal of Great Britain for the time being; Our right trusty and well-beloved Councillors, *John* Lord *Redesdale; Robert* Lord *Gifford*, Master of the Rolls of Our Court of Chancery, and the Master of the Rolls of our Court of Chancery for the time being; Sir *John Leach*, Knight, Vice Chancellor of England, and the Vice Chancellor of England for the time being; and Our trusty and well-beloved Sir *Charles Wetherell*, Knight, Our Solicitor General, *Samuel Compton Cox*, Esquire, one of the Masters of Our Court of Chancery, *Anthony Hart*, Esquire, one of Our Counsel learned in the Law, *Stephen Lushington*, Doctor of Civil Law, *William Courtenay*, Esquire, one other of the Masters of Our Court of Chancery, *Robert Percy Smith*, *Joseph Littledale*, *John Herman Merivale*, *Nicolas Conyngham Tindal*, and *John Beames*, Esquires, Barristers at Law, Greeting: WHEREAS We have thought it expedient, for divers good Causes and Considerations Us thereunto moving, that an Inquiry should forthwith be made, whether any and what Alterations can be made in the Practice established in Our said Court of Chancery, or in the several Offices of that Court, either as a Court of Law or Equity, in Causes, Suits and other Matters, in which that Court has, or the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great

Seal have Jurisdiction, from the commencement of the Proceedings to the termination thereof, whereby the expence attending such Proceedings and the time during which they depend in Court, may be abridged usefully and beneficially to the Suitors of the said Court; and also, whether any and what part of the business now subject to the Jurisdiction aforesaid, can usefully and beneficially be withdrawn from the same, and committed to the Jurisdiction of any and what other Courts or Tribunals: Know ye, that We, reposing great trust and confidence in your fidelity, discretion and integrity, have authorized and appointed, and do by these Presents authorize and appoint, you the said *John* Earl of *Eldon*, and Our Chancellor, Lord Keeper, and Lords Commissioners of Our Great Seal of Great Britain for the time being, *John* Lord *Redesdale*, *Robert* Lord *Gifford*, and the Master of the Rolls of Our Court of Chancery for the time being, Sir *John Leach*, and Our Vice Chancellor of England, for the time being, Sir *Charles Wetherell*, *Samuel Compton Cox*, *Anthony Hart*, *Stephen Lushington*, *William Courtenay*, *Robert Percy Smith*, *Joseph Littledale*, *John Herman Merivale*, *Nicolas Conyngham Tindal*, and *John Beames*, or any Three or more of you, to make a diligent inquiry, whether any and what alterations can be made in the Practice established in Our said Court of Chancery, or in the Offices of that Court, either as a Court of Law or Equity, in Causes, Suits and other matters, in which that Court has, or the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal have, Jurisdiction in the different stages of such proceedings, from the commencement to the termination thereof, by which the expence attending such proceedings, and the time during which they depend in Court, may be abridged usefully and beneficially to the Suitors of the said Court; and also, whether any and what part of the business now subject to the Jurisdiction of Our said

Court; or subject to such Jurisdiction as aforesaid, can usefully and beneficially be withdrawn from the same, and committed to the Jurisdiction of any and what other Courts or Tribunals. And, for the better discovery of the truth in the premises, We do by these Presents give and grant to you, or any Three or more of you, full power and authority to call before you, or any Three or more of you, such and so many of the Officers, Clerks, and Ministers of our said Court, and other persons, as you shall judge necessary, by whom you may be the better informed of the truth in the premises, and to inquire of the premises and every part thereof, by all other lawful ways and means whatsoever: And We do hereby give and grant unto you, or any Three or more of you, full power and authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any person or persons whatsoever, to be examined before you, or any Three or more of you, touching or concerning the premises. And We do also give and grant to you, or any Three or more of you, full power and authority to cause all and singular the Officers, Clerks, and Ministers of Our said Court to bring and produce upon oath before you, or any Three or more of you, all and singular Rolls, Records, Orders, Books, Papers or other Writings, belonging to the said Court, or to any of the officers within the same, as such officers: And Our further Will and Pleasure is, that you or any Three or more of you, upon due examination of the premises, do propose and reduce into Writing, under your hands, such Regulations as you may think fit to be established, respecting the premises; and do and shall, within the space of Two years after the date of this Our Commission, or sooner if the same can reasonably be, certify unto Us, in Our Court of Chancery, in parchment, under your hands and seals respectively, all and every of your several proceedings, by force of these Presents, together with what you shall find touching

or concerning the premises, upon such Inquiry as aforesaid, and what Regulations, respecting such matters as aforesaid, you shall think fit to be established. And We further will and command, and by these Presents ordain, that this Our Commission shall continue in full force and virtue, and that you, Our said Commissioners, or any Three or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment. And We do hereby direct and appoint, that you, or any Three or more of you, may have liberty to certify your several proceedings, from time to time, to Us, in Our said Court of Chancery, as the same shall be respectively completed and perfected. And We hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these Presents. And for your assistance in the due execution of this Our Commission, We have made choice of Our trusty and well-beloved *George Jackson*, Esquire, one of the Sworn Clerks in Our said Court of Chancery, to be Secretary to this our Commission, and to attend you; whose service and assistance We require you to use from time to time as occasion shall require. In Witness whereof, We have caused these Our Letters to be made Patent. Witness Ourself, at Westminster, the Twenty-sixth day of April, in the Fifth year of Our Reign.

By Writ of Privy Seal,

BATHURST.

Chancery Commission.

REPORT.

TO THE KING'S MOST EXCELLENT MAJESTY, IN HIS HIGH COURT OF CHANCERY.

YOUR MAJESTY having been pleased to issue a Commission, under the Great Seal, authorizing and directing the Commissioners therein named, to make a diligent inquiry,— "Whether any and what alterations can be made in the "practice established in the Court of Chancery, or in the "several offices of that court, either as a court of Law or "Equity, in causes, suits and other matters in which that "Court has, or the Lord Chancellor, Lord Keeper, or "Lords Commissioners of the Great Seal, have jurisdiction, "from the commencement of the proceedings, to the termi- "nation thereof, whereby the expenses attending such pro- "ceedings, and the time during which they depend in "Court, may be abridged usefully and beneficially to the "suitors of the said Court; and also, whether any and what "part of the business now subject to the Jurisdiction afore- "said, can usefully and beneficially be withdrawn from the "same, and committed to the jurisdiction of any and what "other Courts or tribunals;"—

WE YOUR MAJESTY'S Commissioners, whose hands and seals are hereunto set, have proceeded in executing the duties imposed upon us by the said Commission; and in discharge of those duties, we have entered into a minute investigation of the various matters, to which, we apprehend, Your Majesty's Commission was intended to apply. We have called before us, and examined at much length, many Persons of high professional character, and of great experi-

ence; and we have received the evidence of every person, who thought fit to tender himself, for the purpose of examination; having caused it to be intimated to the Profession at large, that it was our intention to act upon that principle. We have also collected information from various Official sources; and, as many of Your Majesty's Commissioners have had personal experience in the Courts of Equity, the result of that experience has been fully communicated to the Commissioners at large, in the repeated discussions which have taken place, upon the several subjects which have been under our consideration.

Thus assisted, we proceed humbly to lay before Your Majesty, the conclusions to which such examinations and discussions have appeared to us to lead.

In the consideration of so extensive a subject, it would not, we apprehend, be expected that we should all concur in the propriety of each particular suggestion, contained in this Report; that all should have the same degree of confidence in the effect of any proposed regulations, or the same hope of the benefits likely to result from them, if adopted. But, after full deliberation, we have agreed to submit to Your Majesty the following Report, with the Propositions annexed, as the result of our joint labours.

We have thought proper to subjoin to our Report, the whole of the Evidence taken before us, and which, we apprehend, contains much valuable information, and many very important suggestions. But we are conscious, that in this evidence may be found some extraneous matter, not called for by the course of examination, and not strictly relevant to the proper subject of our inquiry. This has arisen partly from our unwillingness to stop any witness from stating that which he imagined to be material; but in a greater degree, from the liberty, which we thought it proper to give to each witness, of revising his depositions; and of adding what he might think material, in explanation of his views upon the subject. Some of the witnesses have taken advantage of this permission, to add much that was not given orally before us, and to which the questions put did not appear to us properly to lead. We have, upon the whole, determined not to omit any part of the matter so given; chusing rather to incur the charge of unnecessarily encumbering the Appendix, than to run the risk of leaving out any thing which could, by possibility, be deemed material to the subject of our inquiry.

Of this inquiry the principal objects, and those to which the evidence contained in the Appendix applies, are the

jurisdiction exercised in the Court of Chancery, as a Court of Equity, and the jurisdiction committed to the Person or Persons holding the Great Seal, to which the establishments of that Court have been made ancillary.

The jurisdiction of the Chancery, as a Court of Common Law, occupies a very inconsiderable portion of time; and no complaint having been made of any of the proceedings had therein, we have not thought it necessary to enter into any detailed investigation, or to propose any alteration with respect to it.

The distinction which prevails in England, between Courts of Common Law and Courts of Equity, pervades, in a considerable degree, the whole administration of civil justice, not only in England, properly so called, but in Wales, in Ireland, and in several of the dependencies of the Crown of the United Kingdom, in various parts of the globe; and, in discharging the duty imposed upon us, we have not conceived that it came within the limits of our Commission to discuss, whether a system, so extensively established, and so intimately interwoven with the whole of our judicial policy, could now be advantageously exchanged for any other. But we have rather felt it our duty to consider that system, as the foundation upon which we were to proceed, and to endeavour to discover, whether the administration of justice, under it, was not capable of improvement; and to suggest whatever might appear to us likely to produce that improvement.

For this purpose, we have deemed it necessary to consider particularly, what is the nature of the jurisdiction entrusted to the Court of Chancery of England, as a Court of Equity.

The proceedings in the Courts of Common Law are simple, and generally founded on certain writs of great antiquity, conceived in prescribed forms. This adherence to prescribed forms has been considered as important to the due administration of justice, in common cases; but, in progress of time, cases arose, in which full justice could not be done, in the Courts of Common Law, according to the practice then prevailing; and for the purpose of obtaining an adequate remedy, in such cases, resort was had to the extraordinary jurisdiction of the Courts of Equity, which, alone, had the power of examining the party on oath, and thereby acting through the medium of his conscience, and of procuring the evidence of persons not amenable to the jurisdiction of the Courts of Common Law, and whose evi-

dence therefore it was in many cases impossible to obtain without the assistance of a Court of Equity.

The application to this extraordinary jurisdiction, instead of being in the form of a Writ prescribed by settled law, seems always to have been in the form of a Petition of the party or parties aggrieved, stating the grievance, the defect of remedy by proceedings in the Courts of Common Law, and the remedy which it was conceived ought to be administered. This mode of proceeding unavoidably left every complaining party to state his case, according to the particular circumstances, always asserting that the party was without adequate remedy at the Common Law.

In examining the provisions framed for the conduct of business transacted in courts of Equity, it is necessary first to consider what are the subjects usually brought under their jurisdiction: and how it has happened that such adequate remedy cannot be obtained in the courts of Common law, or more convenient remedy may be obtained in courts of Equity.

One great source of the extension of the jurisdiction of courts of Equity has been, the invention of new modes of disposing of property, particularly in the form of Trusts, and the ingenuity of fraudulent contrivances; to which may be added, the power of disposition of all property by will; the vast increase of personal property, which may be disposed of by deed or by will, or distributable according to law, upon intestacy; the difficulty of obtaining complete justice, under the forms of the common law, against persons accountable for property to others, as executors or administrators, or as trustees or agents; or as partners in trade, or joint owners of property; or in a vast variety of other ways in which parties may become so accountable; the demand of justice, for the specific execution of contracts, of various descriptions; and the complication of interests, arising from intricate transactions, for which the course of the common law, in the simplicity of its proceedings, can give no adequate remedy.

But, exclusive of the matters properly belonging to the court of Chancery, as a court of Equity, the Legislature has, from time to time, by the provisions of several Acts of Parliament, public and private, thrown upon the court a considerable load of business, which it was supposed might be most conveniently administered there. The Legislature has also entrusted to the Lord Chancellor, the whole conduct of the vast and difficult jurisdiction exercised under the Bankrupt Laws. In this business, the Vice Chancellor is now

enabled to give assistance; and a portion of it is necessarily also devolved, by special orders for the purpose, upon the Masters in Chancery, and the other Officers of the court.

Commissions to inquire of Lunacy issue from the Chancery, as an office, and the Lord Chancellor has therefore a very extensive and difficult jurisdiction, in the issuing and in superintending the execution of Commissions of Lunacy. The care and custody of the persons and property of those who are found lunatic, by inquisition, has been usually also intrusted by the Crown to the Lord Chancellor; and in the exercise of this duty the officers of the court of Chancery, as a court of Equity, have been made ancillary; and much of the time of the Masters in Chancery, and other officers of the court, as well as of the Lord Chancellor, is thus frequently occupied.

Besides these duties, the Lord Chancellor is greatly occupied, as speaker, in the House of Lords;—by the duty which he has to discharge, in the advice he is required to offer to His Majesty, with respect to condemned criminals, when their cases are reported by the Recorder of London;—by the various claims upon his time in matters of State, and matters referred to him by the Secretary of State;—by occasional attendance when required, at meetings of the Council;—by the duty of carefully examining treaties, conventions, charters, commissions, letters patent, grants, and all the numerous instruments which pass the Great Seal, for the legality of the provisions of which, and the accuracy of their contents, according to the warrants upon which they are founded, he is responsible;—by calls upon his attention to much that relates to the administration of justice by others; and by such judicial business, and other business of his Office, as is transacted by him, but not in Court.

During some years, the Lord Chancellor has been required to attend the Judicial business of the House of Lords, three mornings, and latterly two mornings, in the week; and during the last two years, the Lord Chancellor, and the Master of the Rolls as Deputy Speaker of the House of Lords, have been required to devote five mornings in each week between them, to attendance on judicial business in the same high tribunal; a measure of great benefit to the suitors in that House, but which has produced, and must produce, great delay in the business of the Chancery suitor.

Although the general Plan, upon which the proceedings in the equitable jurisdiction of the court of Chancery are founded, appears to us to be as well calculated, as any system that could be devised, to secure the sound administration of

justice, in those cases which fall within its jurisdiction, yet we apprehend that some alterations may be safely proposed and beneficially adopted. The wisdom of an established rule is frequently not discovered, until a new one is attempted to be carried into effect; and it is impossible, in every instance, to foresee all the effects upon an existing system, which may result from the introduction of any change; we have, therefore, in some instances, felt it expedient to recommend a less extensive alteration than, in the result, the practice ought possibly to undergo, conceiving that, if upon experience what we have suggested should be found beneficial, improvements of a more enlarged nature, for which the propositions we submit will naturally pave the way, may hereafter be safely adopted.

The Court has established certain rules of practice, by which the conduct of suits is to be regulated. It is, we fear, inevitable that such rules, which must of necessity be framed for general application, should in some cases be ineffectual, and in others should operate harshly; and it is to be apprehended that, under any possible improvements of practice in a Court, where the subjects of litigation are so various, and the parties who are affected by its orders so numerous, cases will frequently occur, in which the supineness or ignorance of some men, and the mischievous cunning of others, will lead to much pressure upon individuals; it is, therefore, essential to a due understanding of the subject, that we should, in considering any particular instance of alleged delay or hardship, endeavour to ascertain, with accuracy, whether the evil complained of has arisen from any defect in the practice itself, from any abuse or misapplication of it, which might possibly be prevented by improved regulations, or from the conduct of parties which no regulations would altogether control.

In the whole course of our inquiry, we have kept these considerations in mind; and whilst we feel that, owing to the circumstances under which the court of Chancery was first established, there are, in the system, some defects which may now be corrected; and that in the progress of time, and the increase in number and variety of the subjects which come before the Court, have led to the introduction of abuse, which we trust that a judicious alteration of the practice may remove; yet we are satisfied, from the whole of the investigation before us, that much misconception has arisen relative to the causes of that delay which so frequently occurs in the progress of a Chancery suit; and that much of it is imputable, neither to the Court, nor to its established

rules of practice; but to the carelessness of some parties, the obstinacy or knavery of others, or the inattention or ignorance of agents.

Under these impressions, we proceed to consider by what alterations in the practice of the court of Chancery, the time expended, and the costs incurred, may be reduced beneficially for the suitors. And here we feel compelled to observe, that ignorance, or partial acquaintance with the subject, has led many persons to believe, that a suit in equity may be brought within narrower limits than is really consistent with the perfect administration of justice.

A very slight consideration of some of the subjects with which a court of Equity is conversant, will enable even those who have no legal or technical knowledge, to form a more correct judgment with respect to this point. We think it indeed obvious, from the nature of these subjects, and of the relief which the court of Chancery administers, that, in very many cases, its proceedings cannot be rendered short or summary; and that, in considering its rules of practice, little analogy can be drawn from courts of Common law.

To unravel a long chain of fraud, and by a comprehensive decree to counteract the unjust consequences which have arisen, or may arise from it;—

To investigate accounts, frequently complicated, between persons who employ all their art to perplex and resist;—

To enforce agreements for the conveyance or transfer of property, in which many persons are interested, and long examinations of Title are necessary;—

To compel the correction of mistakes, by which rights have been acquired, according to the strict letter of the common law, but contrary to justice;—

To administer a large property, incumbered with debts, and involved in various difficulties, and to draw out a surplus, to be distributed according to the complicated rights of creditors, and various other claimants;—

To attain these and similar important objects, and to attain them by means, in great measure, of discovery and admissions, which are to be extracted from unwilling or prevaricating defendants, must be the work of much time.

The term "*Delay*," has indeed been so frequently misapplied, as to convey a very incorrect idea, with respect to the duration of a suit in Chancery. Besides the considerations to which we have already adverted, it is material to observe, that a large portion of suits in Chancery embrace the administration of Trusts; and that such suits most beneficially endure, as long as the trust continues. It is obvious

that, in the common case of bills filed for the protection of the property of infants, the suit must last until such infants attain their ages of 21 years; and many trusts are of much longer duration; and the protection of property by the court, and consequently the existence of the suit, is necessarily continued until some person becomes the absolute owner of the property administered. And, as the law permits property to be so limited that it may become inalienable for any number of lives in being, and 21 years more, it may therefore happen, and often does happen, that, in this sense, a Chancery suit will usefully endure for more than half a century.

By what is technically called the "*Practice of the court*," is to be understood that body of rules and orders which are intended to regulate the proceedings of the Court, and particularly the conduct of the parties, as to the time and manner of taking the various steps which they are required to take in the progress of a suit.

About the year 1618, Lord Bacon, at that time Lord Chancellor, appears to have published his collection of Orders, which probably comprised only the more important general rules of practice which had previously obtained. In the year 1635, Lord Keeper Coventry published his Orders, comprising many previously in use; and he was followed by the Lords Commissioners Whitelock, Lenthall, and Keeble, in the year 1656; who adopted many of the then existing Orders, and made some additions to them. Their Orders were copied, with few exceptions, by Lord Clarendon, in 1661; and his collection is admitted to be in force at the present day.

There are many other detached Orders upon insulated parts of the practice, and upon the fees of the officers of the Court; but these Orders have not introduced any alteration in the general system, nor essentially in the practice of the Court. And when we observe how many years have elapsed since that body of Orders was framed, it can be no matter of surprise, that many of the Orders which still regulate the course of proceeding are not perfectly adapted to the character of much of the business, which the increased wealth and commerce of the country have thrown upon the court of Chancery, or to the different circumstances under which the country is now placed. We have carefully considered each rule of practice distinctly, as applicable to each stage of a suit, from its commencement to its final termination; and we have ventured to propose many alterations in that practice, which we have set down in the form of distinct

Propositions. The general nature and grounds of these we shall endeavour to explain, subjoining, by way of Supplement to this Report, a copy of the Propositions which have been thus framed; and also an explanatory Paper prepared by one of our body, who is very conversant with the principles and practice of the court of Chancery, and which, without pledging ourselves to the whole of its contents, we think will be found a very useful and valuable comment upon those Propositions to which it refers.

Before, however, we enter upon the particulars of the Propositions so prepared, we may be allowed to observe generally, that, although some of the alterations which we propose may appear at first sight minute, yet it is upon the operation of the system of practice made up of numerous minute regulations, that the dispatch or delay and the expense of a Chancery suit, so far as either can be affected by any precise rules, must in a great degree depend.

The object ought always to be, to provide that every party should be compelled to take that step in a suit, which the nature of the proceeding calls for, in as short a time as will enable him to be fully advised with respect to the particular act, and to perform what is required of him. If too much time is allowed, the opposite party has reason to explain, and justice is delayed. If too little, there is a great danger of injustice to the party, who is thus hurried on without due preparation; and in consequence of the cause being presented to the Court in an imperfect state, further delay may in the result be occasioned.

The first process of the Court is the Subpœna to compel the appearance and answer of the defendant, to the bill of the complainant.

Delay and expense are occasioned by the manner in which this writ is now made returnable, we therefore propose some material alteration in this respect; and with regard to the form of the writ itself, we think much improvement may be made. It ought to be so framed as, upon the face of it, distinctly to inform the party upon whom it is served, what he is really required to do, and what will be the consequence of his disobedience. (*Prop.* 1.)

The various writs of Subpœna, as now framed, are not at all calculated to effect this object, and we therefore propose that new forms should be adopted for that purpose; and, with the same view of guarding against surprise and ensuring sufficient notice to the parties against whom the proceeding is directed, and to relieve the plaintiff from some burthen

and expense, we have recommended alterations in the manner in which writs of subpœna are required to be served. (*Prop.* 2).

After the defendant has entered his appearance, he is allowed a certain time before he is compelled to plead, answer, or demur to the plaintiff's bill. When it is recollected that a defendant is obliged not only to put forward his own defence, which must be supported by his oath, but to admit or deny, also upon oath, every fact stated in the plaintiff's bill, of which he may be in any manner cognizant; and that upon his admissions, made without the liberty of recalling or altering them, the plaintiff may establish a claim for relief; it will be readily felt that ample time ought to be allowed for taking so important a step. It is impossible to fix any time in this respect, which will be applicable to all cases; all that can be done is to allow such a period as experience shews to be generally sufficient; although we know that in many cases it is longer than can be required; and that in some others, an extension must be given. (*Prop.* 3).

The rule which we recommend upon this head, will, in some degree, shorten the time now allowed, and will simplify and render less expensive the proceeding, by taking away the necessity, which now exists, of obtaining Orders for time, as they are called, by motion of course. (*Prop.* 4).

If the defendant should not put in his answer within the time allowed by the practice of the court, a long line of dilatory and expensive process has hitherto been resorted to, for the purpose of compelling him to file it, or of enabling the plaintiff to proceed without it, and to have the facts of his bill taken as matter confessed, upon which a decree may be obtained.

If, in the infancy of courts of equity, all the caution, which this long series of proceeding implies, could be considered necessary, in order to soften down the objections to the jurisdiction itself, it scarcely can be requisite, at a period when the jurisdiction is fully established, to incumber the suitor with the expence, occasioned by these various steps to effect the same object. We have therefore suggested several new rules for this part of the practice, which will shorten and simplify the proceedings, and will enable a plaintiff to get with effect against a defendant, who contumaciously or ignorantly refuses to put in his answer. (*Prop.* 5 *to* 8, *inclusive*).

Tables have been furnished, by one of the witnesses, so constructed as to exhibit at one view, the whole of the complicated process now in use: by reference to which, and to

our Propositions, a just notion may be formed, both of the existing practice, and of the degree to which it will be shortened and simplified, by the proposed alterations.

When the defendant has put in his answer, it is obvious that such answer may be either evasive and insufficient, or may disclose matter which makes it necessary for the plaintiff to amend his bill, in order to introduce some new matter, or even to frame his case in a new shape, and to put in issue facts which have come to the knowledge of the plaintiff only from the statements in the defendant's answer, or have become material in consequence of the nature of the defence made by it. If the answer is found to be imperfect or incomplete, as to any material part of the case made, or discovery sought by the plaintiff, means must be taken to compel a more full disclosure from the defendant. This is obtained, in the simple case of insufficiency, by taking exceptions, or, in other words, objections to the answer; and, if the plaintiff is advised, not merely to accept, but also to extend or vary his case, then by amending his bill. Such amendments generally require a new answer, upon the coming in of which, also, the necessity for further consideration on the part of the plaintiff may arise. It is essential, to the purposes of justice, that sufficient time should in all these cases be allowed. The nature and object of equitable jurisdiction particularly require this. No decree could be satisfactorily made, embracing the various points in a cause, and binding the rights of all parties interested, under any course of proceeding, in which the plaintiff had not the opportunity of compelling full discovery from the defendant; or in which all parties had not ample time to bring forward, upon the pleadings, their respective views of the case, in a full and perfect manner. It is, however, certain, that the rules, which had been established to regulate this part of a suit, have been greatly abused; and we think that the rules themselves have allowed a greater latitude than the generality of cases require, more especially considering the facility of communication which is now common to all parts of the country. We have minutely considered those rules, and propose various alterations in them, calculated to shorten the time beneficially. (*Prop. 9 to 21, inclusive*).

But, besides the propositions which directly tend to abridge the time allowed for proceedings in those stages of a cause to which we are now adverting, we recommend some further alterations in the practice, which will, in our opinion, materially relieve the suitors, both as to delay and expense.

We refer, particularly, to a rule proposed for empower-

ing the Master, upon reporting an answer insufficient upon exceptions, to fix the time for putting in a further answer, according to the view which he is then enabled to take of the case, (*Prop.* 15), and to those still more important rules, by which, in order to remove the doubts which it will be seen by the evidence have been entertained on this point, it is declared that it is the Master's duty, in deciding upon the sufficiency of an answer, to consider the relevancy and materiality of the question referred to; and by which it is further provided, that his decision upon exceptions shall be without appeal, unless in those cases in which he shall himself express his opinion that the subject is fit for the consideration of the Court. (*Prop.* 100 *&* 101).

Our Propositions (*23 to 32, inclusive*), will be found to contain many other regulations, applicable to the progress of a suit, before it is at issue; and to the various interlocutory proceedings which occur in that stage of it. In framing these, we have kept in view the principle to which we adverted with reference to the time to be allowed for answering; and, although we are conscious that any alteration in the established practice of a court, must in some degree be considered as an experiment; yet, having proceeded after deliberate examination, and with the benefit of much experience of the existing system, we are satisfied that the practice, when altered as now proposed, if acted upon with due diligence by the persons practising in the court, and steadily enforced by the Judges, as far as the conduct of parties and judicial authority will enable them to enforce it, will materially shorten the duration, and lessen the expense of a suit.

It is, however, to be observed that solicitors may agree in particular cases to dispense with the general rules made for the benefit of suitors; and that there are cases in which it may be reasonable that they should so agree, and in which it would certainly not be for their client's interest to complain to the Court, or to call for its interference.

But, if an unnecessary delay is often occasioned in the preparatory stages of a suit in equity, this is less injurious than that which the existing rules of the Court permit to a plaintiff who is reluctant or negligent in bringing his cause to a decision.

According to the present practice, after a defendant has fully answered the bill, although the plaintiff should take no step in the cause, the defendant is not entitled to call for a dismissal of the plaintiff's bill, for want of prosecution, until the expiration of a period, depending upon the length of the law terms, but which may generally be computed at about three quarters of a year. To prevent the order to

dismiss from being then obtained, the plaintiff may file what is termed a replication, by which he gains, without making any real advance in the cause, a further delay of the same period of about three quarters of a year; and if, at the expiration of that period, the plaintiff, upon a motion to dismiss the bill, will give an undertaking to speed his cause, he may prevent his bill from being even then dismissed. And if, after this undertaking, he does not proceed before the expiration of another term, he is still allowed an opportunity of keeping his suit alive, by giving another undertaking to speed the cause with effect; and it is only after this second undertaking, that he is under the necessity of proceeding to a hearing, with due diligence; or of altogether losing the benefit of that suit.

In our Propositions, we have suggested that the plaintiff should be compelled to enter into this undertaking, to speed his cause with effect, at the end of the following term after the answer is deemed sufficient, thereby avoiding, in this respect, a delay, which the present practice permits, of about one year and three quarters. But this rule is necessarily guarded by provisions applicable in cases in which there are several defendants; with a view to which, we have also framed a separate Proposition. (*Prop. 22, 23, 24*).

It must however be observed, that the dismissal of a bill for want of prosecution, is only analogous to a nonsuit at common law; and that, both with respect to the former rule, and to that which we propose as a substitute for it, inasmuch as to a new bill such a dismissal of a former bill cannot be pleaded in bar, a defendant may sometimes not consider it as really for his benefit that such a dismissal should be ordered.

As, according to the present practice, much additional delay may still be occasioned by the very extensive privilege of amending his bill, which a plaintiff now enjoys, we have thought it right to propose some Rules, which, leaving to the honest suitor an ample opportunity of presenting his case fully to the Court, will prevent the plaintiff, whose object is delay, from harassing the defendant, by an abuse of the liberty, which is still necessarily allowed, in this respect. (*Prop. 28, 29.*)

The cause being at issue, if it turns at all upon disputed facts, the parties proceed to examine their witnesses, in support of the case which they have respectively made upon the pleadings; or it may happen that one party, only, feels it necessary to produce Evidence.

Much objection has been frequently urged against the mode of taking Evidence in the court of Chancery; and we

are not insensible to the imperfections which belong to it; although we believe that the consequences of such imperfections have been overstated. We have anxiously considered this part of the subject, with a view to the proposal of such alteration as might remedy the alleged evil, without producing results, more injurious to the suitor, than those which are found to flow from the present system. But we have not been able to satisfy ourselves with any plan, which has either been suggested, or has occurred to us, upon this part of the question.

An objection that has been often made to the present mode of taking proofs in the court of Chancery, is, that it deprives the Judge, who is to decide the cause, of the benefit of an oral examination, and an observation of the demeanor and conduct of the witnesses; but this objection cannot be removed, because it is obviously impossible for the Lord Chancellor, Master of the Rolls, and Vice Chancellor, to take all examinations in person. But if it were otherwise, it would be necessary, either to have a court of Chancery perpetually going the circuits of the country, or to bring all witnesses to London, which would be attended with serious inconvenience and heavy expense.

Another objection is, that the parties have not the opportunity of being present by their counsel, to question and cross-examine the witnesses *vivâ voce*. But we very much doubt whether any alteration, in this respect, could be introduced, which would, upon the whole, operate as an improvement.

In the first place, such an alteration would increase the costs of a suit; and the time employed would also be lengthened, by objections taken, and by arguments raised, upon points of evidence: and a Judge would be required of sufficient weight and authority to control the course of examination within legal and proper limits. And, even if such a Judge were provided, the full benefit which results from the *vivâ voce* examination, before a judge and jury, in a court of law, could not be obtained from oral examinations in the court of Chancery, inasmuch as such examinations could not be taken in the presence of the Judge, who is to decide the cause. In cases of much doubt upon the facts, resort must still be had to the trial of issues before a jury, which course is now taken in all such cases, where that mode of trial is properly required.

If we could feel satisfied that the increase of delay and expense, which would probably follow from having open and public examination, conducted by counsel, could lead to any material saving of either, in the ultimate decision of a cause,

we should be inclined to recommend the experiment, but we do not think that this would be the case.

The result of the Evidence, and of the experience of those amongst us who have had much practice in a court of Equity, leads us to be satisfied that the instances are very rare, in which there is even any suspicion of ultimate injustice, in consequence of the existing mode of taking evidence.

The number of cases depending upon testimony so nicely balanced, that, after examining the evidence produced, with all its bearings, the conscience of the court cannot be satisfied without the assistance of a jury, is small, in proportion to the whole mass of cases submitted to the court of Chancery: and this is evidently owing to the power, peculiar to courts of Equity, of compelling the defendant to answer, upon his oath, to every statement which the plaintiff thinks fit to make in his bill. It may also be noticed, as an advantage belonging to the practice which we are now considering, that it preserves and records the evidence which is thus taken.

Upon the whole, we are not prepared to recommend any very considerable changes in the present mode of taking evidence.

We have, however, suggested some Regulations (*Prop.* 40 *to* 46, *inclusive*), with respect to the examination of witnesses by the Examiners in London; and, with regard to Commissions for the examination of witnesses in the country, we think that a great improvement would be made in the mode of taking evidence, if the execution of such Commissions were intrusted to persons of experience, named by the Lord Chancellor, in each county or district, as Masters extraordinary in Chancery are now named by him; and our Propositions (*Prop.* 47 *to* 45, *inclusive*) fully explain our purpose in this respect, and suggest a considerable diminution of the expence of executing such commissions, as well by the reduction in the number of Commissioners, as by limiting to a certain sum, per diem, the allowance to every person in attendance, for his subsistence and time, instead of the daily entertainments which now take place, upon the execution of such commissions, at the expence of the suitors.

Our attention has also been directed to another point, of some importance, connected with this subject, namely, whether the delay and expence of taking evidence by depositions might not be saved, by resorting at once to a Jury, in those cases in which it appears probable that the facts will ultimately come to be settled by an Issue. But, after mature deliberation, we think that no rule can be laid down for this purpose, except in the case for which we have provided, of an heir at law, entitled to an Issue, upon the validity of a will of real property. (*Prop.* 54).

In connection also with this subject of evidence, it may be proper, in this place, to observe that some advantage will be derived, in the investigation of facts, from the power with which it is proposed to invest the Master, of examining parties, and witnesses, *vivâ voce*, upon inquiries before him. (*Prop.* 92). If this power is judiciously exercised, and applied only to cases to which it is conveniently applicable, it may frequently save much time, and consequently much expence, in the prosecution of such inquiries, and in the subsequent proceedings; for parties will often be induced to acquiesce in the conclusion drawn by the master, from facts brought before him in this manner, and recorded for the court, who would take exception to his report, if founded only upon the more imperfect mode of written examination.

The evidence having been taken, Publication, as it is termed, then passes; that is, the examinations are concluded, and the depositions made public, and copies given out to the parties.

Before this is done, and after the cause is at issue, much delay frequently occurs, and costs are also occasioned, by applications being made, without any sufficient ground, to enlarge publication, or in other words to extend the time, within which it shall be imperative upon the parties to close the examination of witnesses. Such an application may sometimes be necessary, but it is much oftener made without any necessity whatever, from the mere habit of procrastination.

These applications, from their not having been opposed or complaint made to the court upon the subject, constantly take effect as matters of course. We have provided a remedy for this evil, by proposing that, in future, they should not be allowed, except upon special grounds, verified by affidavit. (*Prop.* 53).

After publication is passed, the Cause is to be set down for Hearing. It so often happens, that a suit in equity is intended by the plaintiff himself, to be a dilatory proceeding, that it is necessary to lay down rules for preventing delay, even in this stage of a cause; and we consider that the alterations which we propose, will operate beneficially in this respect. (*Prop.* 25, 26). Without entering into a recapitulation of those provisions which apply to this matter, and which cannot be better explained than by reference to the precise terms of the Propositions themselves, it is sufficient in this place to remark, that an early period is fixed for setting down the cause, even when witnesses are examined, saving of course in this, as in all other cases where a limitation of time is provided, the discretionary power of the court

to grant extension, where the circumstances of the case appear to make that just.

With respect to the delay which occurs between the time of setting down a cause for hearing, and the actual hearing, it is obvious that it cannot be regulated by rules or orders, but must necessarily depend, in a great degree, upon the quantity of business which is brought before the court. We consider that many of our Propositions will have an important effect, in relieving the Court, and will thus accelerate the dispatch of its general business.

We here principally refer to those Propositions which, in some matters of minor importance, make final the decisions of the subordinate Judges of the court and of the Masters, and to those which regulate Appeals, and Motions in the nature of appeals; and to the Propositions which have arisen out of the performance of that part of our duty, which directs us to inquire, whether any business could be usefully and beneficially withdrawn from the jurisdiction of the Lord Chancellor, or the court of Chancery. (*Prop.* 176 *to* 188). All the Propositions to which we here refer, are explained in different parts of our Report. We think further, that our Proposition, as to the limitation of the number of Counsel, will have some beneficial effect in saving the time of the Court.

In the prosecution of our inquiries, we called for the daily Cause Papers of the court during the last three years, and they are stated in our Appendix. We find that these cause papers give no sufficient information as to the business which has been actually done in the Lord Chancellor's court; and that the time of the Lord Chancellor has been generally occupied, not in hearing the matters which appear in the cause papers, but by the incessant intervention of other business specially brought before him on the plea of immediate urgency and importance.

The great degree to which this interruption has prevailed, can only be judged of by the testimony given by the deputy registrars and secretaries of bankrupts and lunatics, which will be found among the printed Evidence.

The cause being heard and decided, a very important duty devolves upon the Registrar, of taking down the Minutes and drawing up the Decree.

At this period of the suit, considerable delay frequently occurs; and the expense of a decree, in favour of a plaintiff, is also great, in all cases in which the pleadings are long. The delay appears to arise, not so much from the length, however that may affect the costs, as from the difficulty, in cases of any importance, of settling the minutes of the judgment upon which the Decree is to be founded. The judg-

ment for a plaintiff, in a court of Equity, is not, as in a court of Law, simply a decision upon a definite point in his favour; but, in almost all cases in which he succeeds, the decree to which he is entitled, embraces several points, finally disposes of some, and directs various inquiries or accounts, with a view to the determination of others: and it is not easy, nor always possible, for the Registrar to write down, at once, full minutes of such a decree as ought to follow the Judgment, which the Court has given. Formerly, and when the business before the court was very much less than at present, it was the practice for the registrar to read out the minutes taken by him for the decree, in the presence of the Judge, and of the counsel on both sides, in whose absence the minutes can seldom be satisfactorily settled, immediately after the decision pronounced; and we believe that disputes or difficulties, in settling the decree, rarely occurred, when this was done.

But this practice has been long discontinued, and it is the opinion of the most experienced judges and counsel, that it could not be entirely resumed, under the pressure of the increased business of the court, and from other causes, without much inconvenience. And we are satisfied that this, as well as many other matters, which occur in the course of our inquiry, must, from the impossibility of submitting them to any positive regulations, be left to the discretion of the Individuals who preside in the several branches of the court of Chancery. All that can be done by positive regulation is, to take care that no want of sufficient officers, nor the existence of any official forms shall prevent a suitor from getting his Decree prepared with reasonable dispatch.

The number of Deputy Registrars is now the same as it was before the office of Vice Chancellor was created, and as it has been for many years; and two of these officers, instead of one, being now engaged in attendance upon the court, they are not able to devote as much time, as formerly, to the preparation of minutes and decrees in their office. We have no hesitation in recommending that two additional Registrars should be immediately appointed; and we have further suggested the propriety of taking measures for securing a constant supply of persons properly qualified to fill those offices in future; in case it should not be thought fit to put the whole establishment of the registrar's office upon a different footing. (*Prop.* 60, 61, 62.)

There are, at present, four deputy registrars, two entering registrars, and eight clerks, who are appointed by the deputy registrars in rotation. These clerks are usually admitted into the registrar's office, at the age of 18 or 19 years, each

paying to the deputy registrars, upon admission, a premium of 500*l.* or more: and, as vacancies occur, they rise in the office according to seniority. The emoluments of their offices vary according to their seniority; the profits of the chief clerk being about 500*l.* and the profits of the junior clerk about 150*l.* a year. By the course of the office, the senior clerk, upon a vacancy, succeeds to the situation of entering registrar; and the entering registrar, in like manner, succeeds to the office of deputy registrar; although the Lord Chancellor has authority to disturb the order of succession, in case of evident incompetency, and such an instance has once occurred in modern times. It may be stated that, upon an average calculation, a clerk does not become a deputy registrar in less than 25 years. It is the duty of a deputy registrar to frame all orders and decrees of the court; and from the complicated nature of suits in equity, the directions to be given in those orders and decrees, which are consequential upon the decision of the Court, as to the litigated questions in the cause, require, in the deputy registrar, a familiar and extensive acquaintance with the principles and practice of the Court, and a comprehensive view of the whole subject of the suit. The present system of the registrar's office has furnished, and does now furnish registrars who are well qualified for the discharge of their duties; but it appears to us, that the succession of clerks, who are received into the office, before any experience can have developed their talents for such business, leaves these important offices more exposed to accident and chance, than is altogether consistent with the public interest. We think that the office of registrar would give full exercise to all the ability of gentlemen of very considerable talent and experience at the Bar; and that the present profits of the office would prove a sufficient inducement to persons of that description; we therefore venture to suggest, that it might more certainly secure the effectual execution of those offices, if they were filled hereafter by Barristers of not less than 10 years standing, to be appointed by the three Judges of the court, each judge nominating his own two Registrars who should remain permanently in his court. In such case, a just and reasonable compensation would be due to the present Clerks of the establishment, for the disappointment of their fair hopes of succession; and the clerks, in future, having no longer in view the valuable office of deputy registrar, as an ultimate reward for their services, should have such encreased emoluments as would secure efficient persons in those situations. By the 49 Geo. 3, c. 42, the Lord Chancellor is empowered to remove any deputy registrar who is afflicted with any perma-

nent infirmity, disabling him from the due execution of his office, and to direct the payment to him for life, of an annuity not exceeding 1,100*l*. We cannot but think that it would give more efficiency to the office, whether the present establishment does or does not continue, if a registrar were permitted to retire, upon adequate terms, upon length of service alone.

Having come to the conclusion, that it would not be practicable, in all cases, that the minutes should be read or prepared, immediately after the decision pronounced, we yet feel that some check ought to be imposed upon a practice, which now prevails to a great degree, and leads to much delay and some expense, of applying to the court to vary the Minutes, at an indefinite, and sometimes very distant period after the judgment pronounced.

No proceeding can be more inconvenient to the Court, or less satisfactory to suitors, than an application for this purpose, made, as it frequently happens, when the court and the counsel may have a very incomplete recollection of the circumstances, or merits of the case; and the discussion may therefore occasion additional expense to the parties, and a waste of the time of the court. We have, therefore, proposed to fix a reasonable limit as to the time within which such applications must be made; and we cannot too strongly recommend that, when such applications are made, experienced Counsel, employed in the cause, should attend on both sides. The effect of this, we trust, will be, to enforce the expediency of seeing that all necessary and proper directions are provided for by the note taken upon the decision. (*Prop.* 63).

We have taken some Evidence, and have had much consideration as to the propriety of establishing a shorter mode of drawing up Decrees, than is now in use. We find that, in the opinion of very many experienced persons, the advantage of having the nature and substance of the case set forth in the document which contains the decision, overbalances any evil which results from its length; and we do not propose any new rule as to the form of decrees, although we wish strongly to enforce the propriety of greater attention, than appears now to be paid to the terms of Lord Hardwicke's Order, in this behalf, which directs, that "the "recitals shall be confined to the substance and scope only "of the pleadings, tending to the points in controversy, upon "which the decree is founded, and to be made in the most "concise manner, and not to contain any recitals immaterial "to the points in question." To abridge long pleadings, in conformity with these directions, requires much judgment,

care, and attention, which it has been utterly impossible for the deputy registrars to employ upon this part of their duty, in all cases, since the increased occupation of their time in court; and the task has therefore devolved upon their clerks. We trust that one beneficial consequence arising from the proposed increase in the number of the registrars, will be, that they will be enabled to give more time to the preparation of decrees, and return to a more correct mode of making the necessary recitals and statements. And, although we are of opinion, that it is necessary that decrees should continue to be drawn according to the established form, with which the party taking the decree must of course be furnished, yet we think, that other parties may very properly be relieved from the necessity of taking copies of the whole decree, which, in many cases, must be useless to them: and we have, therefore, inserted a provision to that effect, amongst our Propositions. (*Prop.* 59).

The course of our inquiry now brings us to that period of the cause, at which the duty of the Master in Chancery usually begins. References are, indeed, frequently made to the Master at an earlier stage of the cause; but we have thought it most convenient to defer, until now, making any remarks upon the practice of the Master's Office, as it is after the first hearing of a cause by the Court, that the most important references, and those which are most likely to lead to delay and expense, are directed. This is, in many points of view, an essential part of our inquiry. Few cases in Chancery can be brought to a final decision, without inquiries before the Master. The length of time consumed in those inquiries, has been one of the most prominent subjects of complaint against the Court; a complaint in our opinion not unfounded, although, in many cases, unjustly directed against the practice of the Masters' offices. With respect to the Masters, indeed, the progress or termination of references is rarely affected by any conduct of themselves or their clerks, but depends upon causes over which they have hitherto had no control.

We have taken much evidence upon this branch of our inquiry, both of the solicitors, who have had much experience, and of the clerks in the Masters' offices; and we have received Returns from the Masters themselves, some of which go so fully and satisfactorily into the whole subject, that we think it better to refer to them generally, than to extend to any great length our remarks upon the present practice of the offices. In considering what alterations might beneficially be made in that practice, it appeared to us important, in the first place, to determine how far, and in what manner,

it is possible to give the Master a more efficient control and direction of the proceedings in a cause, after it is referred to him.

By the present practice, the Master proceeds to execute the directions of the court, only upon the application of the plaintiff, or of some other party authorized by the court to make such application to him. The parties take their own time for every step, in the prosecution of the decree: the Master having no power to direct or expedite their proceedings.

We consider the question, as to the active interference of the Master, in the proceedings in his office, to be one of great nicety, and we are quite aware of the difficulties which attend any attempt at improvement in that respect; but still we are of opinion that much may be done; and we are satisfied, as well from the evidence which has been taken, as from information communicated by the Masters themselves, that a large portion of the evil, which is sustained by the Public, in consequence of the expense and delay of a Chancery suit, may be removed, by giving to the Masters, in a greater degree than they now possess it, the active superintendance over the proceedings, in a cause or other matter, after it has once been brought into the office.

It has been objected, that such interference is not warranted in principle, and that parties ought to be left to conduct their suits according to their discretion. This might be true, if all suits, in a court of Equity, were (like actions at law) disputes between two contending parties, who may be safely left to conduct their cases in the way most conducive to their respective interests. If this were the case, the remedy would be very simple. The Master need not be, in any degree, an actor, to direct or call for any steps in the proceedings. He would only have to pursue the same course which a court of law pursues, to decide in favour of the vigilant, and against the sleeping party; and there are certainly some cases in which this course may, and ought to be followed by the Master, for which we think he wants no new powers; but with a view to which, his powers, and the duty that lies upon him to exercise them, require to be more generally felt and explained.

In cases, also, where all parties (being competent) concur in suspending proceedings, it would not be advisable to make it incumbent on the Master to urge them forward.

But there are other large classes of cases to which a proceeding *ex parte*, as it is commonly called, is wholly inapplicable. To the evil of delay in such cases, a remedy of a different nature must be applied.

Inquiries are frequently directed, or accounts ordered to

be taken, which involve the interests of many persons, besides the actual parties to the suit; and who in some cases, as in inquiries after next of kin, or heirs at law, may not be represented at all; or, as in the case of inquiries after debts and legacies, may be represented by some individual, whose particular interest is insufficient to stimulate him to proper activity.

It is obvious that, in such cases, the object of the court, with a view to the attainment of justice, must be, to have its directions executed; not to have the subject disposed of, in consequence of the default or delay of any parties; and we are therefore of opinion, that it is perfectly consistent with the principles upon which a court of Equity proceeds, that the Masters should, so far, become actors, as at least to direct and expedite the execution of its decrees, in those cases in which the ordinary incitement to activity, from the interests of contending parties, is wanting. Much discretion must, of necessity, be left with the Master, in the application, either of existing rules, which have been too much neglected, or of such further rules as may be made, for his guidance.

In the first place, and as a necessary means for enforcing all other regulations, we propose (*Prop.* 66) that the Master should keep in a book, a distinct Record of every direction given by himself, and of every step taken, in each cause or matter in his office; so that he, or his clerk, or the Court, (when necessary,) may see, at one view, the whole course of the proceeding in any particular case. The books of the office, and the notes taken by the Master, will, in general, furnish such information at present, but in an imperfect manner; and we are satisfied that much good effect would follow, if each solicitor knew and saw, that there was lying by the Master's side, a book, which would at any time furnish authoritative evidence of every step taken in the cause, and of the activity or negligence with which the proceedings were conducted.

The decree or order being brought into the office, the Master's clerk will, according to our Propositions, give to the solicitor bringing it in (of course, and without special application) a warrant or notice, that the master fixes a particular time for considering the matter of such decree or order; and it will be the duty of the solicitor to give notice of the appointment to all parties in the cause. Upon this attendance the Master will have the decree read over in his presence, and will settle with the solicitor the course of proceeding to execute it. He will also in many cases decide what parties are entitled to attend future proceedings, and will direct the

necessary advertisements, point out which of the proceedings may properly be going on *pari passu*, ascertain what accounts are proper to be taken, and fix the times within which the accounting parties are to bring them in. He will determine, moreover, to what particular matters evidence appears to be necessary, and whether the matters requiring proof shall be proved by affidavit, or by examination of witnesses; and if the latter, he will issue his certificate for a commission. It is not to be conceived, by any persons who have not had much experience in these matters, how much time is frequently lost, for want of taking a comprehensive view of the whole decree, at an early period. The solicitor takes up and prosecutes one inquiry, or one account only, at a time, when perhaps the whole directions of the decree might have conveniently been carried into effect, within the space of time which is employed upon that single inquiry or account; and it not unfrequently happens that the Master, or his clerk, when applied to for a general Report, discovers, upon going through the decree, that some material part of it has been overlooked by those whose duty it was to carry on the proceedings. And we are the more desirous of enforcing the necessity of some improvement in this respect, because we know that many intelligent and active solicitors do enable the Master to adopt the course here recommended, without difficulty to themselves, and with great advantage to their clients, to whom much delay and expence are thereby saved.

When, upon due consideration of the nature of the proceedings, the Master thinks it proper to fix a time for any particular step to be taken, he will, according to the proposed plan, do this in the presence of all the parties, and he will, of course, note in his book this attendance, and all that is directed upon it.

We are confident that all respectable solicitors, when a time is fixed by the Master, in their presence, upon a view of the nature of the case, and noted in his book, for any particular proceeding, will exert themselves to complete it within that time, and that none will expose themselves to the animadversion which must be the consequence of their neglecting it.

By having an accurate record of all the proceedings in the office, and by fixing stated times for certain proceedings, whenever the nature of the case admits of it, it will at least be made obvious to any person conducting a cause, that, if he is guilty of delay, his conduct must be exposed to the Master, and may readily be represented to the Court; and evidence will be secured, to shew what each person does, and what each person omits to do. These considerations

alone will render the simple plan here proposed, very useful in expediting the conduct of causes, through the Master's office.

But, further, there are cases and occasions in which the Master can proceed *ex parte;* that is, in which, upon default of a party to do that which it was his duty to do at the prescribed time, the report may properly be made, in favour of the other party. In all such cases, this course ought to be pursued by the Master, and rigorously enforced. No warrant to review ought to be granted, unless upon special application, founded upon grounds sufficient to excuse the delay, and supported by evidence. This principle appears just, and of easy application to simple cases between plaintiff and defendant; but in the more numerous class of cases, where parties are multiplied, in family and friendly suits, and in suits by creditors, in which many inquiries become necessary, there will be more difficulty.

In all such cases, wherever the solicitor for the plaintiff, or the person who had the duty of prosecuting any part of the decree, is guilty of neglect in prosecuting it, a fact which can always be ascertained without difficulty, if the regulations here suggested are adopted, the Master ought, upon the application of any other person interested in the inquiry, being either a party in the cause, or entitled to come in before him, to commit the prosecution of such part of the decree to the person applying. And in cases, in which any application is made to the Court, to obtain the conduct of a cause, on the ground of delay, we think it would render such an application more generally effectual, if the party applying were bound previously to obtain from the Master his certificate, of dates and of proceedings had or neglected, from which the Court would, at once, judge of the degree of delay, and easily decide whether the party accused could sufficiently explain his conduct.

Besides the appointment of fixed times, which we have suggested, as proper to be made at the first reading of the decree, we think the Master ought, upon subsequent attendances, whenever the nature of the case admits of it, to appoint certain times, within which each successive proceeding shall be completed, and to note such appointment in his book; but with respect to this, much discretion must be left to the Master.

When the Master directs an accounting party to bring in his account, he should fix a stated period for the purpose, and at the same time decide what parties are entitled to attend the passing it.

Much improvement may also be made in the mode of tak-

ing accounts. It appears to us, that by the present course, copies of accounts are multiplied, without any adequate benefit to the suitor; and we see no reason why a plan, similar in most respects to that pursued in passing Receivers' accounts, may not be adopted with advantage: some Regulations are accordingly proposed for this purpose. (*Prop.* 79 *to* 85 *inclusive*).

It appears to us, that by the adoption of the alterations provided for by us in this respect, the expense and inconvenience of at least four copies will be saved; and, at the same time, the accounts will be preserved in a more convenient form. And as we conceive, that in some instances accounts may be investigated more expeditiously and satisfactorily by an accountant than by the Master, we have proposed a rule, according to which this may be done in proper cases.

The Master should fix stated times for all the operations necessary in passing the accounts; and he should be cautious not to permit the default or dilatoriness of an accounting party to involve others in unnecessary expense, or to harass them by unnecessary delay; for the prevention of which, he will be invested with a degree of authority which he has not hitherto possessed.

We have framed many Rules (*Prop.* 65 *to* 103) for the purpose of carrying into effect the alterations which we recommend in the course of proceedings in the Masters' offices: and we expect and believe, that much time and expense will be saved to the suitors, by the adoption of them. It is obvious, however, that the most salutary rules of practice must be ineffectual, if the conduct of business is entrusted to incompetent agents. We learn from the Evidence, confirmed by the information of the Masters, that much time is frequently lost, and expense consequently increased, by a practice which prevails with some Solicitors, of sending young or inexperienced clerks to attend before the Master, whose attendance merely answers for the purpose of earning the fee, without enabling the Master, in any degree, to expedite the business of the client. It has been suggested, that it would be proper to lay down a rule, that the Master should always be attended by the Solicitor in person, and not by a clerk; but we doubt whether this would be easily practicable. Solicitors of respectability, who form a very large class, are usually intrusted with much business of importance of a confidential nature, requiring their personal and anxious attention, and which cannot be delegated to a clerk; whilst, on the other hand, it generally happens, that Solicitors of this class have in their offices one clerk, or more, well versed in Chancery practice, and perfectly competent to conduct a

suit through all its stages. Some Solicitors there certainly are, of the greatest talents and experience, whose habit it is always to attend to their Chancery business themselves; and it is extremely beneficial to their clients, to have the personal attention of such men; but we apprehend, that a general rule upon the subject might be attended with inconvenience. If it were adopted, many Solicitors, intrusted with the general business of a client, who becomes involved in a Chancery suit, would feel obliged to decline the conduct of a business that might so much interfere with their other avocations: others, less occupied, or less scrupulous, would undertake to conduct it, who, by their want of practice in such matters, and from the other unavoidable calls upon their time, would involve their clients in unnecessary delay and expense. But although, on these accounts, we doubt the expediency of requiring, in all cases, the personal attendance of the Solicitor in the Master's office, yet we think it quite necessary that some remedy should be adopted to cure the evil to which we have just adverted. The Regulations which we propose will; it is hoped, tend in a great measure to the removal of it, by obliging those Solicitors who have not a competent clerk, to attend in person, and by confining the attendance of Clerks to those who have sufficient knowledge and experience in the business which they are employed to transact. (*Prop.* 106 *to* 108).

It may be proper, in this place, to refer to another inconvenience which has been sometimes found to exist in the proceedings in the Master's office, against which, we fear, it is not possible wholly to provide, although we think it may be lessened.

There being ten Masters, it sometimes happens that parties have to complain of a want of uniformity, in the course of proceeding adopted in the different offices. The subjects which come before these Officers, are so multiplied, and of such variety, that it appears impossible to secure uniformity by any positive rules, applicable to all cases. As to many, the rules which we propose will have this effect; and as to others, we recommend that the Masters should meet, from time to time, for the purpose of preserving uniformity in the mode of applying and acting upon the existing rules of practice in their offices, and of obtaining the sanction of the Court for any new regulations which may appear to them necessary.

Another point connected with this part of our inquiry remains to be noticed and explained. It will be found that some of our Propositions relate to the manner in which it

may be fit that the Masters should, in future, be remunerated. This subject, important in itself, and involving considerations, upon which, without disrespect to the judicial office, different opinions may be entertained, we have not thought to come within the terms of our Commission, any further than as it may actually affect, or at least lead to the opinion that it does affect, the interest of the Suitors, in respect of expense or delay in the proceedings. With regard to expense, there is no doubt that the suitor would be materially relieved, if the whole of the fees were discontinued, and the Masters were in future paid entirely by salary; but we have had no hesitation in rejecting this suggestion, as unjust to the public. A great part of the Master's duty consists in superintending the administration of private property, and in other matters of a more personal nature, and which concern the individuals before him, much more exclusively, than those which fall under the cognizance of other Judges. The charge, therefore, of these Officers is, not unfairly, laid upon the suitor; and in whatever manner it may be thought fit that the remuneration should be received, we think the fund out of which it is to be paid should continue to be provided, in part at least, as at present, by fees payable on the proceedings.

The payments for copies of proceedings taken from the Master's office, form at present the principal source from which the masters are remunerated; and, from the manner in which these payments are assessed (at a fixed rate per folio), these Officers, of high rank and authority, have been exposed to the imputation that proceedings are lengthened in their offices, with a view to the increase of emolument. We believe such a charge has no foundation whatever, in any existing practice; but no room ought to be left for the most remote suspicion of it: and we therefore strongly recommend that the Masters should no longer have any interest in the receipt of monies paid for copies of proceedings; (*Prop.* 111).; and as, after such an alteration, there will be no further reason for the extraordinary rate of charge now imposed, and as, considered merely as a tax towards a fund, it does not bear upon the payer, as it ought, in proportion to the benefit received, we further recommend that it should be reduced to the ordinary rate; and that parties should no longer be under the necessity of taking copies, unless where they think their interest concerned in doing so, or where the Master specially requires it, for the sake of accuracy in the proceedings before him. (*Prop.* 113 & 114).

With regard to the other fees, they are not considerable in themselves; and form, in their total amount, a small pro-

portion of the emoluments of the Masters; and it is not possible to consider them as liable to the same objection as we have stated to apply to copy-money. We have not, therefore, found any sufficient reason, connected with the duty prescribed to us, for proposing any more general change, in a system long established. We have however suggested a revision of the whole subject of fees in the Master's offices.

The changes which we propose by our Propositions, in the practice of those offices, will so materially affect the character of the business which is there transacted, and consequently the amount of the fees, that it will require some considerable time to ascertain, by experience, what may be reasonably computed, as the average annual amount of any fees which may be receivable by the Masters, in part of their emoluments. In recommending, therefore, that the Lord Chancellor and the other Judges of the court, should suggest the proper arrangement in this respect, we consider that any final arrangement must necessarily be suspended, until experience has determined the average annual amount of the fees to be retained by the Masters; and that in the meantime, those fees should be quarterly accounted for by the Masters to the Judges of the court; and that they should receive quarterly such addition, in the way of salary, as, with those fees, would make up a sum equal, upon the whole, to their present average emoluments: and that, when experience has ascertained the average annual amount of those fees, the Masters should then receive such certain and fixed salary, as, with such average amount, would be equal to their present average emoluments. (*Prop.* 117.) It is not, however, our purpose to recommend that any alterations which can affect the present remuneration of the Masters should take place, until the provisions we have suggested for their future remuneration, should be carried into effect by the legislature.

We find also, that a considerable portion of the emoluments of the chief Clerks in the Master's offices, who have very laborious and important duties to perform, arises from payments made to them, under the name of Gratuities. We recommend that these payments should no longer be allowed; but we think that the Clerks should have a liberal fee upon the completion of all reports; and such other fees as may be fixed by the Lord Chancellor, and the other Judges, under the revision recommended by our Proposition in that behalf. (116).

The next stage of the proceeding, after the Master has made his Report upon the matters referred to him, is the Hearing of the Cause, for the purpose of obtaining the Fur-

ther Directions of the court, which are consequential upon that Report. The present practice permits that the cause should be set down, to be heard on further directions, before a different Judge from him who pronounced the decree, by which the reference was made to the Master.

We think it would be more convenient, if all Causes on Further Directions were heard before the same Judge who pronounced the original decree, and who must best know the particular view and purpose for which the Master was directed to make the several inquiries referred to him; and we have expressed this opinion in one of our Propositions. (120).

When a cause is heard on further directions, the Decree is usually made for the distribution or payment of Funds in court, by the Accountant General.

This Office was established, on its present footing, in the year 1725, since which no alteration has been made, except an increase in the number of clerks, in consequence of the increase of business. Some idea may be formed of that increase, by adverting to a return made to us by the Accountant General, containing a statement of the annual numbers of accounts, and the annual amounts of effects, standing in trust for the suitors of the court, for each successive year since 1726; and also by referring to the statement of the duties of the office, made to us by the senior clerks.

The practice that prevails in the office, appears to us well calculated to unite correctness with reasonable dispatch. We wish, however, to suggest one alteration, of some importance. At present, in all cases in which there is Stock in the name of the Accountant General, in trust in any cause or other proceeding, and there is an order that the dividends shall be laid out, from time to time, to accumulate, it is considered necessary that, upon each payment of the dividends, there should be a written request from the solicitor of the party interested, to the Accountant General, to invest them; a rule which we presume has been adopted, with a view of giving to such party a discretion, from time to time, to determine, whether it was beneficial to have the dividends so invested. But, although the rule may sometimes operate beneficially in this respect, yet we believe that a serious loss is frequently occasioned to the parties, by the neglect of their solicitors to make the necessary request; we therefore recommend that this rule should be altered, and that, in future, it should be the duty of the Accountant General, as of course, upon receiving an order to invest dividends from time to time, to make the investment regularly, without special request; leaving it to the parties interested, by application to the court, to prevent or postpone the investment, as cir-

cumstances may render it more advisable. (*Prop.* 122). We consulted the late Accountant General upon this point; and we learned from him, that the proposed course would be conveniently practicable in the office; but that, from the manner in which the clerks are now employed, it may require the assistance of a separate clerk, whom the Accountant General has by statute the power to appoint, when necessary.

With a view to the convenience of men of business, who have occasion to call at the Accountant General's office, for the receipt of dividends, we think that attendance should be given, for the payment of money, from ten o'clock till two, instead of the present hours allowed for that purpose, which are from eleven to two.

We find that some payments in the nature of Gratuities, but to no large amount, have been usually made to the chief Clerks in this office. Considering all payments of this description to be objectionable, and liable to much abuse, we recommend that these should be abolished. Another small source of profit to the chief Clerks, which arises from the preparation of Powers of attorney to be used in the office, and of the affidavits of their due execution, we think ought to be continued and sanctioned; being of opinion that it is for the benefit of suitors that these instruments should be prepared in the office: and, for the same reason, we think the Clerks should continue to make transcripts of Accounts. But we recommend that both these duties should be paid for by fixed fees, according to a former Report made by the Commissioners appointed by Your Majesty, for inquiring into the Fees and Emoluments of the officers in the court of Chancery.

The Observations which we have hitherto submitted to Your Majesty, and the Propositions upon which we have remarked in this Report, have been limited to those parts of the proceedings in the court of Chancery, which depend upon what is termed in technical language the "*practice of the court.*" But, in reviewing the progress of a suit, from its commencement to its termination, we have been led to consider, more at large, the course of proceeding ordinarily adopted by the Court, and our attention has been directed to several particulars, not falling strictly within the description of the Practice of the court above stated, and, in a great measure, incapable of being regulated by positive orders; but in which, we humbly conceive, some improvement may safely be attempted, without infringing upon those principles, by which a court of Equity ought to be guided. The point which has first presented itself to our consideration, upon this part of our inquiry, relates to the forms of Pleadings,

which, according to the established orders of the court, are required to be short and succinct. It must, however, at the same time, be admitted that, in practice, they are often liable to the charge of unnecessary prolixity, and which the Court can only notice in case of an application being made to it for that purpose. We consider that much of this prolixity is to be attributed to the habit of the Pleader to introduce, in all cases, the same extensive forms, which are necessarily required in the most complicated subjects.

At the very commencement of a suit, it is impossible not to feel that, in cases of mere administration, where the point in dispute is a question upon the simple construction of some instrument, the same forms of pleading cannot be requisite, as in those of complex litigation. As one mode of avoiding the evil, resulting from a want of sufficient discrimination between cases differing in character, we propose that in some, which turn wholly upon construction, the Judgment of the Court may be obtained upon Petition, without resorting to the usual proceeding by Bill and answer. (*Prop.* 123). It has been suggested that it might be expedient in other cases, where the plaintiff seeks no discovery from the defendant, to enable him to proceed, in like manner, upon petition, or by bill, without answer; taking care to provide that the defendant shall have due notice of the proceedings, so as to enable him to make his defence in whatever mode his interest should appear to require it. In rejecting this suggestion, under the apprehension that, without effecting any ultimate saving of time or expence, it might, if adopted, have led to greater embarrassments, we were much influenced by the consideration that, in a case like that supposed, the plaintiff may, by the present practice, so shape his bill as to call for a merely short and formal answer; and also by adverting to the effect which must be produced by a liberal construction of our Proposition, declaring the Master competent, in all cases of reference for insufficiency, to judge of the materiality of the points excepted to. (*Prop.* 101).

It must be admitted that there would be danger in laying down any rules, so precise as to fetter the discretion of the Pleader, which ought to be freely exercised, according to the circumstances of every case. The ordinary forms and structure of Pleadings in Equity, though established by usage, are not prescribed by any positive regulations; and, although it has been the general practice of the Profession to adopt the same forms of pleading in all cases, we cannot but consider that parts of them might properly be omitted, where, in the judgment of the Pleader, they are not required by the actual circumstances of the case. Terms of strong recom-

mendation are, however, all that can be safely or usefully applied to the prevention of unnecessary prolixity; it being always remembered that the existing rules of the court, if rightly understood, and strictly resorted to, provide a sufficient check to the abuse, arising from the introduction of matters purely irrelevant or impertinent.

1. It is one principal advantage of our system of Equitable jurisdiction that, by embracing the interests of all parties who can possibly be affected by its decision in any suit, it not only does complete justice in every suit instituted, but prevents all future litigation respecting the same rights of property; and with a view to this object, it is a general rule of practice that all persons having an interest in the subject of the suit must be brought before the court either as plaintiffs or defendants. This general rule has however in many cases been relaxed, where, from the great number of persons interested, it would be impracticable, or inconvenient, to prosecute the suit, if all were made parties on the record, and certain persons named, either as plaintiffs or defendants, have been permitted to represent all other persons having a like interest in the subject of the suit: we think that this relaxation of the general rule may possibly be extended, beneficially to the suitors of the court, but we do not attempt to specify particular instances, considering that the Court has already an ample discretion in this respect; and we cannot doubt that it will exercise that discretion, in every instance where it can be clearly seen that it is more for the benefit of all Parties interested, that their rights should at once be concluded in a suit in which a part is allowed to represent the whole class, than that delay or expense should be occasioned by a strict adherence to those rules which would require the appearance of every individual.

It frequently happens that, after a cause is referred to the Master by a decree, some event occurs which gives to an individual, not originally before the court, an interest in the subject matter of the suit, and consequently, according to the rule of a court of Equity, a right to become a Party to the proceedings; a rule, not merely of a technical nature, but founded upon the plainest principles of justice. A supplemental bill in such cases becomes necessary; nor have we, after repeated consideration, been able to discover any mode by which this could be safely avoided. The evil to be guarded against is this; that where a defendant is desirous of creating delay, in which case alone the rule can be at all injurious, he may take advantage of those regulations with respect to the time allowed for answering, which are framed for general application; and may insist upon

having eight or ten weeks time to put in that answer, which he might, without difficulty, have filed in as many days; and may waste several months more, by refusing to consent that the Supplemental Cause shall be heard as a short cause; that is, as one which may, from its nature, be heard out of its regular course, without injury to other suitors. No positive rule against this expenditure of time can be laid down, because, although in many cases the Supplemental Bill is a merely formal proceeding, yet, in others, questions of difficulty, and requiring time to answer, may and do arise. But as, at the period of the cause to which we are now referring, it is already before one of the Masters, we propose that, whenever a Supplemental Bill becomes necessary in that stage, the defendant shall not have any time to answer fixed by general rule, but that the Master shall in each case, at his discretion, upon a view of the particular matter, fix a time within which the answer shall be put in; and further certify, at the request of either party, if, in his judgment, the Supplemental Cause is fit to be heard immediately as a short cause. (*Prop.* 109). It is obvious that, by these regulations, a proceeding may frequently be completed in a few weeks, which, under the present practice, may be protracted for many months.

It appears upon the Evidence, that a general persuasion exists, that where, in consequence of some doubt arising upon the Construction of a will or deed, an Executor or Trustee finds it necessary to place himself under the direction of the court of Chancery, it is the usual course of the court to assume the management and execution of the whole Trust, and thereby to entail upon the parties much delay and expense, which would be saved to them, if the executor or trustee were left, after obtaining judgment upon the doubtful point, to execute the trust according to his own discretion, in conformity with that judgment.

The first observation that occurs upon this part of the subject is, that, in a great proportion of cases in which the trusts of a will or deed are carried into execution, under the superintendence of the court of Chancery, it is the wish of the parties interested, that they should be so executed; and that, in most others, the bill is so framed, that the court is called upon to superintend and direct the execution, with a view to the indemnity of the party upon whom that duty will otherwise devolve. If the parties interested are minors, and therefore not competent to sanction the act of the trustee, by their consent, no rule could secure the trustee against the possibility of having his conduct impugned, when those parties attain their majority; and although due caution, on his part,

may protect him from ultimate injury, yet the chance of being involved in a suit, at a distant day, is sufficient to induce most men to shrink from the responsibility of acting, in any complicated or extensive Trust, without the sanction and indemnity of the Court. This indemnity ought certainly to be afforded with the least possible expense or delay; and we trust that the general alterations which are recommended in our Propositions, will do much good in this respect.

By the present practice, indeed, if all parties interested in the Administration of trust property, which is placed under the direction of the court of Chancery, being under no legal disability, are desirous of preventing delay, and the solicitors understand their business, and exert themselves to get through the cause, little, if any, more time need be occupied than would be necessary for the proper administration of the same property, without the intervention of the court. In such cases, it is almost always necessary to ascertain and investigate Debts, to examine and pass Accounts, to inquire after Parties entitled, as next of kin, or other classes of persons, answering some description in the will or other instrument. If the circumstances of the case are simple, these operations need not occupy any length of time, either in or out of court; and in a complicated case, experience shows that they are not usually concluded very quickly, even out of court; especially when the persons interested are numerous, although their interests may not be adverse.

In suits, such as those to which we are now referring, for the Administration of Trust property, the completion of Sales, made under the decrees of the court, may be so conducted as to become a prolific source of delay. But, before we can judge with tolerable accuracy, whether any and how much of the delay incurred in any such case, is fairly imputable to the practice of the court of Chancery, we ought to know in what space of time sales of the same property, to various purchasers, would be completed, if made without the intervention of the court. It is to be remembered that, in such cases, the purchaser exercises his own discretion in accepting or rejecting the Title. If he makes no objection, the court interposes neither difficulty nor delay. If he does state objections to the title, these are upon summary application referred to the Master, without any delay. Upon the whole, then, we do not think that the ordinary course of the court, in suits for the administration of trust property, does necessarily lead to delay, beyond that which must take place under any mode of administering it. But we are aware that the rules of practice, which are made applicable to all classes of

suits, do afford, to parties, who are either desirous of delay, or are careless and indifferent about its occurrence, an opportunity of protracting such a suit, to the great injury of other persons interested in the result, especially if, on behalf of these persons, the Court is not, as it seldom is, applied to. The new Rules of Practice, which we recommend, (*Prop.* 102 & 103), and particularly those which relate to proceedings in the Masters' Offices, are intended to correct this evil.

But, although we do not think that much ill-consequence, in regard to delay, in the suits of which we have been speaking, results from the course of the court in such suits, if properly understood and acted upon, yet it is undoubtedly true, that, in point of fact, much expense is frequently incurred, which might be avoided, and which produces no corresponding benefit to the parties, particularly in cases of small property. We hope that the alterations suggested, by abridging the power of *delay*, will also materially lessen the *expense* of proceedings.

After all that can be done, however, as the expense of a Suit in Equity must be considerable, it is desirable to provide, as far as possible, against those cases which sometimes occur, in which Trust property is brought under the administration of the court, even against the wish and intention of the parties filing the bill; a state of circumstances which may arise in the following manner. An Executor, or Trustee, finds some point of difficulty in the Will, upon which he wishes to have the Judgment of the court, but he is desirous, in all other respects, to execute the trust; and the parties interested (being all of competent age and condition) have confidence in him, and wish him so to execute it. In such a case, we conceive that, according to the present course of the court, a suit may be so framed as to obtain a judgment upon the doubtful point, without calling for further interference in the execution of the trust; but we know that, in practice, this course is very rarely adopted. We have, therefore, thought that it might be useful to express the opinion which we entertain upon the point, in the words of one of our Propositions. (*Prop.* 124). It is our further wish strongly to impress upon the attention of all those who are concerned in the institution of suits, particularly such as arise out of Wills, the important duty which belongs to them, of considering well, in the outset, in what manner the suit may be so framed, as to obtain only the decision that is really wanted, and not to involve parties unnecessarily in protracted and expensive proceedings. No new rule, however, can be laid down upon this head; but the discretion and judgment of

Practitioners must guide them, under the circumstances of each particular instance: while to that very numerous class of cases, in which property comes to be administered by the court of Chancery, from the wish of the parties interested, or from the refusal of a trustee to act, it must be recollected, that most of the Rules, to which we have before adverted, are applicable, in some stage or other of the proceedings.

A point of importance, on the subject of Pleading, remains to be noticed, arising out of the very plain proposition, that a party, being a defendant to a suit in equity, ought, in all cases, to be enabled to submit to the court any matter of fact, by reason of which he apprehends that he is not, in strict justice, compellable to make the disclosure sought by the bill. According to the present rules of pleading, a defendant may *Demur* to the discovery, upon any ground of objection which is apparent on the face of the bill; and he may allege, by way of *Plea*, any fact, not stated in the bill, which operates as a bar to the discovery. He may also either *Demur* or *Plead* as to part, and *Answer* as to the remaining part of the bill. But in so doing, if he answer any part of the bill which, by the plea or demurrer, he insists he ought not to answer, he is considered as having over-ruled, or in other words as having deprived himself of the benefit of his plea or demurrer; his answer being, in that respect, regarded as inconsistent with such plea or demurrer. In practice, this frequently operates to embarrass the justice of the case, inasmuch as it imposes upon the Pleader a degree of minute accuracy, which, with the greatest attention on his part, in difficult and complicated cases, may not always be attained; and the consequence of the slightest failure of strict technical nicety, in this respect, is, that the defendant is driven to the necessity of answering the whole bill; and is thus compelled to make a discovery, which, in real justice, the plaintiff may not be entitled to claim from him.

On these grounds, it has been thought expedient to recommend (*Prop.* 125), that a defence by Answer should be permitted, in all cases to which a plea or demurrer would, according to the present practice, be applicable; providing, at the same time, for the plaintiff, an expeditious mode of obtaining the decision of the court, on the question of the defendant's liability to make the discovery sought.

It has not unfrequently been suggested, that the Court ought to require some security for the truth of the statements contained in the plaintiff's bill; and more especially in cases, where the plaintiff seeks an Injunction to restrain the defendant from proceeding against him at Law, and ob-

tains that Injunction, as matter of course, unless the defendant is able to put in his answer in a very short and limited time. It is certain that the unfettered privilege, which the plaintiff is now entitled to, of stating his case in such manner as he thinks fit, is capable of abuse; but if he introduces matter not pertinent to the questions submitted to the court by the bill, or reflecting upon the conduct of the defendant, in any respect not bearing upon the subject of the suit, the present practice of the court provides the defendant with the means of expunging the impertinent or obnoxious matter, at the expence of the plaintiff. It is true that, in the Injunction causes to which we have referred, the plaintiff may derive a direct advantage in the suit, from the introduction of mere fiction into the statements of his bill. He may, by the inventions of falsehood, render the statements in his bill so confused and complicated, as to make it impracticable for the defendant to give a complete answer to the bill, within the short time limited, and for many reasons wisely limited, by the court, for that purpose; and may thus gain, for a time, an injunction to stay the defendant's proceedings at Law. But, in all cases of fraud in a court of Equity, and especially in these cases of Injunction bills, which frequently relate to commercial transactions, and the negotiation of money securities, the plaintiff, and the Counsel who draws his bill, may, from certain known facts, rationally infer that certain other unknown facts have actually taken place; and it may be essential to the discovery of the truth, that these conjectural facts should be alleged in the bill, and that the defendant should be strictly interrogated with respect to them; and in such instances, the justice of the case might be altogether disappointed, if a plaintiff could introduce no allegation in his bill, which he was not prepared to support by affidavit. For these reasons, we cannot recommend that any Affidavit should be required, in support of these Injunction Bills, except that the plaintiff, and his solicitor, should both make their affidavit, that the Bill was not filed for delay, and only for the purpose of obtaining Equitable relief or discovery, according to the effect of one of our Propositions. (*Prop.* 126).

Our Propositions will be found, also, to contain many further provisions for the prevention of delay, and for obviating its ill effects when it does take place. As these do not appear to belong, particularly to any one stage of a suit, upon which we have before observed, in tracing its progress from the commencement to the close, by final decree, we have thought it most convenient to postpone thus far our remarks upon this class of the Propositions; and we shall now only

give a general outline of what we recommend, referring to the Propositions themselves, for a further explanation of their respective objects.

In tracing the history of that delay, of which complaints are made in the progress of a suit for the Administration of assets, it will be found that such delay has sometimes arisen from the circumstance, that the same Solicitor is employed both for plaintiff and defendant; and sometimes because there is no person, who is an actual party in the cause, possessing a sufficient motive for activity in pushing it forward, or prosecuting those accounts and inquiries, which may be necessary for its completion: as in the case where the suit is instituted by a Creditor, in collusion with the Executor, and for the mere purpose, either of protecting the executor from creditors who are suing him at law, or of preventing a suit being instituted against him by a really adverse creditor. And in other cases, an Executor himself files a bill, not for the fair purpose of the administration of the assets, but from the same improper motive of protecting himself from legal suits by creditors.

In each of these cases it is obvious, that all the means of obtaining further time, which the general Rules of the court afford, as absolutely necessary in many instances, will frequently be resorted to, where they are wholly unnecessary, often for the very purpose of postponing the distribution of the fund; and often also from negligence and ignorance, or from a culpable indifference to the interests of those who have claims upon the fund, but who are not the immediate clients of the Solicitor employed. Against this evil, we have been very anxious to provide; and we hope that our Propositions will be found well calculated to counteract the various means of delay that are resorted to, in suits such as we have referred to.

In the first place, we think that it should be provided, that the same Solicitor shall not be employed for plaintiff and defendant, in a Creditor's suit. (*Prop.* 104).

After much consideration, we are not of opinion that it would be expedient to lay down a positive Rule, that the same solicitor shall, in no case whatever, be employed for plaintiff and defendant, as we conceive that some cases occur in the court of Chancery, in which there is convenience and a saving of expense, from such employment; but as it may frequently happen, that after a decree, even in those suits which have been properly conducted up to that point, by one Solicitor, the interests of the several parties may appear to conflict, upon further prosecuting the accounts, or other proceedings in the Master's office, we have thought

it right that the Master should, in all cases, use his discretion to call for the attendance of a separate Solicitor for any party whose interest appears to demand it. (*Prop.* 105).

We believe that our provisions (127 *to* 132 *inclusive*) for requiring an Executor or Administrator to set forth in the outset of a cause, upon his oath, the amount of the Funds in his hands, coupled with the increased facilities which are given to all parties interested, to make a summary application in respect of those funds, will be very effectual in preventing delay and expense in the prosecution of these Administrative Suits; and will check the institution of some which are now instituted with an unfair or fraudulent object. We are the more confirmed in this belief, from the acknowledged benefit to the suitor which has resulted from a modern rule, that where an Executor applies to the Court to restrain a Creditor from proceeding against him at Law, he must file an affidavit, stating the actual Balance of the Testator's estate which is then in his hands. We consider, that most of the provisions to which we are now referring, are not new in principle; but, for the same reasons which induce us to recommend, that the Master shall be called upon to exercise a more active superintendence than heretofore over a cause, we think it right to extend and vary the means by which the parties in a cause, and those who have an interest in the proceedings, though not parties on the record, may control and expedite the progress of the suit, and secure the proper and early application of the Funds which are the subject of it.

The terms of the Propositions themselves, will explain the manner in which we think that these objects may be attained, in as great a degree as it is practicable to attain them by any regulations of the court. Very much, after all, in suits, must depend upon the zeal and activity of agents, and not a little also upon the vigilance of parties themselves, in looking after their own interests. It may seem extraordinary, that any recommendation should be necessary in this respect. But it has constantly happened, that persons having a deep interest in proceedings pending in the court of Chancery, although they feel the inconvenience arising from delay, yet content themselves with general complaints against that court, without appealing to the Court itself for redress, which its practice would afford, and without taking the slightest pains to ascertain the true state of the cause, or to inquire whether, under the existing system, a reasonable exertion on their part might not obtain a remedy for the evil of which they complain.

By the present rules of practice, the remedy against unnecessary delay is, in many instances, in the hands of the party who is affected by it. But we have felt the propriety

of extending this principle as far as it can safely be extended; and we propose various regulations, of which the object is, to enable parties who are affected by delay, to urge on the prosecution of suits at all the different stages in which such delay may take place; and in order that every individual may have the means of judging whether such interference on his part is necessary, in respect of any proceeding in which he is interested, we provide the means by which the actual state and progress of every cause may be readily ascertained, and at a trifling expense, by every person taking the trouble to apply for such information. (*Prop.* 134).

We may here, also, properly notice some other proposed alterations of importance, in the ordinary course of proceedings, not unconnected with this part of the subject, and which are calculated materially to assist suitors, in obtaining more expeditious relief in the court of Chancery. By two of these (135 & 136), we propose to extend a principle, which has in some instances been beneficially recognised in courts of equity, and to enable a Defendant, in certain cases, to obtain a decree, and prosecute a cause, although the Plaintiff is desirous of abandoning it; and by others (137 & 138 *inclusive*), we recommend that the Court should, in certain cases, give that relief, upon summary application in a cause, which can now only be obtained by a Decree; and should in other cases direct Accounts to be taken, or Inquiries made, in an early stage of the proceedings, which by the present practice are only directed by the Decree, and which frequently postpone the final settlement of the cause for many months.

The regulation, (*Prop.* 139), which proposes a restriction, as to the number of Counsel who shall be entitled to be heard, on behalf of each party, has been adopted by us, not without hesitation; but we feel ourselves driven to recommend it, when we find that, not unfrequently, many Counsel are heard for each party, and that a single matter sometimes occupies the Court for several days.

We are fully sensible of the inconvenience which arises from the attention of Counsel being distracted, by the simultaneous sitting of two Judges of the same Court; but it has not occurred to us, that any direct remedy can be applied to it. We think that our Propositions will in some degree correct this inconvenience, by limiting the number of Counsel, and by encouraging the distribution of business to Barristers who have not the rank of King's Counsel; and, with the latter view, we think it might be useful, if no Barrister of any rank were permitted to make more than two Motions at each time of being called to by the Court; and if the Court

were to go through the whole Bar, before it called upon any gentleman a second time. This practice has long prevailed in the court of Exchequer, and prevails also in the court of King's Bench, to a greater degree; no Barrister being there permitted to make more than one Motion, at each time, when he is called to by the Court. The practice of the court of Chancery permits every Barrister, when called to by the Court, to go at once through the whole of the Motions, which he is instructed to make; this extended right of Pre-audience necessarily checks that distribution of business, which might otherwise prevail, and we think that, under the present circumstances, the practice of the court of Exchequer might be usefully tried in the court of Chancery.

It sometimes happens that the Hearing of a cause, or other matter, is prevented, and expense as well as delay occasioned, by the non-attendance of the Solicitor for one of the parties, or of any proper person on his behalf; or for the want of deeds or papers, which ought to be produced to the Court by some Solicitor. We have suggested, by one of our Propositions, (*Prop.* 140), that it would be expedient that the Court should have authority, in such cases, to order the Solicitor to pay, personally, such Costs, to all or any of the parties, as the Court, in its discretion, shall think reasonable; and the Solicitors should, in all cases, be prohibited by order from receiving, from their clients, costs, which they have been directed personally to pay.

Much stress has been laid, by some persons, upon the increase of delay and expense which is supposed to arise, from the intervention of the class of officers, known by the name of Clerks in Court. If we were now engaged in framing a new system, it might become a matter of grave consideration, whether it would be useful to establish officers, distinct from the Solicitors, for the performance of all those duties which are now performed by the Clerks in court; but for that part of their duties which regards the Records of the court, separate officers must at all events be established. Under actual circumstances, it could not be prudent to make any change in this respect, unless upon a case of inconvenience, clearly proved.

We are satisfied, from the Evidence before us, that no material delay and a very trifling expense, arise from the intervention of the Clerks in court; and we believe that the existence of these officers does tend to secure a degree of regularity and uniformity of practice; which, considering the great extent and variety of the business of the court of Chancery, could not be obtained without them. Upon the whole, we see no sufficient ground for any alteration respect-

ing them, except that, by one of our Propositions (141), we suggest, that the fee charged for an attendance in court, which never takes place, ought to be abolished.

We have also had under our consideration the nature and duties of the office of Six Clerk. Those duties are particularly set forth in the Report, made in the year 1816, by the Commissioners appointed to inquire into the duties, salaries, and emoluments in courts of Justice; and we have also examined one of the present Six Clerks. We cannot think that there is sufficient occasion for six persons in this office, or that the suitors derive adequate benefit from the fees paid therein. But we are of opinion that these Officers may, under new regulations, be employed most usefully for the Public, in the discharge of the duty in Taxing Costs, from which it is, upon many accounts, desirable to relieve the Masters. We do not here enter into the details of those regulations, which will sufficiently appear from the Propositions themselves (142 *to* 146, *inclusive*), and from the supplementary Paper before referred to. It is sufficient to observe, that the plan proposed will operate beneficially, both upon the Taxation of costs, and upon the general character and efficiency of the Masters' Offices.

We propose, also, some new Rules (147 *to* 153, *inclusive*) as to the Costs to be allowed in various cases, the principle of which is to bring the costs, awarded to a successful party, as nearly as may be, to the amount of the costs properly incurred by him.

A difficulty has been some times experienced, amounting to a failure of justice, from the contumacy of a party, who refuses to obey a decree or order, directing him to execute some instrument; thereby depriving his adversary of the benefit which he is entitled to derive from the judgment of the Court. We propose (*Prop.* 155) that a power shall be vested in the Court, which will remedy this evil; and we also recommend (*Prop.* 156) some alteration in the process for obtaining possession of land, when a party has obtained a decree, or order, for that purpose.

We have also introduced, amongst our Propositions, certain other suggestions, of minor importance, and of a technical nature, which are scarcely susceptible of any other general explanation, than is afforded by the language of the Propositions themselves; and their utility and application are fully elucidated by the explanatory Paper, which is the labour of one of the Commissioners, and to which we have before referred.

Before, however, we close this part of the Report, we trust that we may be permitted to observe upon one other

point, immediately connected with the subject of it. No person can have had much experience in courts of Equity, without feeling that many suits owe their origin to, and many others are greatly protracted by questions arising from the niceties and subtleties of the law and practice of Conveyancing. Any alteration in this system must be made with the greatest caution; but, as connected with the object of saving time and expense to suitors in the court of Chancery, we venture to submit to Your Majesty's consideration, whether it might not be proper to commit to competent persons the task of examining this part of our Law, with a view to determining if any improvement may safely be made in it, which might lessen the expense, and narrow the field of litigation respecting the transfer of Property.

The last branch of the inquiries, to which we are directed to apply ourselves, is, "Whether any and what part of the "business, now subject to the jurisdiction of the court of "Chancery, can usefully and beneficially be withdrawn from "the same, and committed to the jurisdiction of any and "what other Courts or Tribunals."

In the present state of the law, a Commission for the Examination of Witnesses, who are resident abroad, and whose Evidence is to be used upon an action at law, cannot, except in cases provided for by special Acts of Parliament, be awarded by a court of Law, before which any action is depending, unless by the consent of both parties; and, where such consent is wanting, the party seeking the Commission, can only obtain it, by filing a bill in Equity, for that purpose. We are not aware of any sufficient reason for the continuance of this practice; and it does appear to us, that considerable delay and expense would be avoided, if the jurisdiction now exercised by courts of Equity, in this respect, were withdrawn from them, and committed to the courts of Law, excepting only those cases in which the actual purpose of the bill is to obtain Discovery also; and we have framed a Proposition to that effect. (*Prop.* 161).

By the several Acts of Parliament, for the better security of the Liberty of the Subject, by the writ of *Habeas corpus*, the Lord Chancellor is invested, concurrently with the Judges at common law, with the authority to award that writ; this jurisdiction, so foreign to the general nature of the business of the Court, was probably committed to the Lord Chancellor, by reason that he is usually in London, when the Judges at law are absent on their circuits. It has become a recent practice for applications for these writs of *Habeas corpus* to be made to the Lord Chancellor, although the Judges are all in London; and a considerable portion of the time of the

Lord Chancellor has been employed in the discussions arising upon the return of those writs, to the great delay and prejudice of the regular business of the Court. The occasional absence of the common law Judges would render it inexpedient that this jurisdiction should be withdrawn from the Lord Chancellor; but we think it would be a public advantage, if the Lord Chancellor were empowered, in times of great pressure of business before him, to make such writs of *Habeas corpus*, as should be applied for to him, and should be awarded by him, returnable, not before himself, but before some Judge at common law; and we have suggested a Proposition to that effect. (*Prop.* 165).

It frequently happens that a new jurisdiction is created in the court of Chancery, by local or private Acts of Parliament. We cannot but adopt the view, which has been taken upon this subject, in the Report of the Committee of the House of Lords, upon the Appellate jurisdiction of that House; and we follow that Committee, in recommending, for the relief of the court of Chancery, that such jurisdiction should, in future, be conferred upon the court of Exchequer, whose system and official establishment are, by a modern statute, made applicable to it. We also recommend, that the jurisdiction which arises under the Acts for Benefit or Friendly Societies, should be transferred to the same court.

Upon this branch of our inquiry, it now remains for us to advert to a suggestion, which has been frequently repeated, as to the expediency of transferring the Jurisdiction in Bankruptcy, from the Lord Chancellor, to some other tribunal, to be constituted for that purpose. We have deliberated upon this subject with much attention; and, in the result, we are of opinion, in common, as it seems, with almost every witness who has been examined upon it, that, inasmuch as the business in bankruptcy involves in it the consideration of the most important points, which can arise, either in a court of Law, or court of Equity, it is not to be expected that the final Jurisdiction in bankruptcy can be transferred from the high judicial authority of the Lord Chancellor, to any other tribunal, with equal advantage, or equal satisfaction to the Public; and more especially since, in matters of bankruptcy, there is no appeal to the House of Lords.

We have further to observe, that the business of petitions in bankruptcy, in its actual state, even without the ameliorations which we shall presently propose, is not by any means sufficient to fill the whole time of any Judge or Court; and it is obvious that a Judge or Court, whose jurisdiction should be confined to matters in Bankruptcy, would be less familiar

with the general doctrines of equity, administered in Bankruptcy, than a Judge, who was habitually practised in the whole range of Equitable jurisdiction; and it also appears to us, that the multiplication of courts of separate jurisdiction, must, in itself, be considered as an evil to be avoided, whenever it is not absolutely necessary.

Our conclusion upon this subject is, that it would not be useful, or beneficial, that the jurisdiction in Bankruptcy should be withdrawn from the Lord Chancellor, unless it should eventually appear that it cannot be retained, consistently with the due dispatch of the other business of the Court. We presume to recommend, therefore, that before any alteration in that respect is attempted, a fair and full trial should be had of the effect of our Propositions: and we are not without a considerable degree of confidence, that many of the alterations, proposed by us, will tend to a substantial saving of the time of the court.

Having come to this conclusion, we have considered ourselves authorised, by Your Majesty's Commission, to enter into an examination of the present administration of the jurisdiction in bankruptcy, by the Commissioners, so far only as appeared to be necessary for the purpose of ascertaining whether, by any alterations in the mode of bringing bankrupt petitions before the Court, the time of the Judges might be beneficially saved.

Matters in bankruptcy are heard by the Lord Chancellor and Vice Chancellor upon Petition; and the greater number of petitions in bankruptcy profess to be appeals from the decision of the Commissioners of bankrupt: but the parties, not being confined, upon the appeal, to the same evidence which was adduced before the Commissioners, the hearing before the Lord Chancellor and Vice Chancellor has, in practice, become, for the most part, not an appeal, but an original hearing: the expense and delay of which might, in many cases, have been saved to the parties, if they had proceeded with due circumspection and care, before the Commissioners.

All questions of fact, in Bankruptcy, are brought before the Court upon Affidavits; and from the nature of many of these questions, and the description of persons concerned in them, these affidavits are very inconveniently extended in number and length, and are frequently found to be of the most conflicting and opposite character. The evidence to be collected from affidavits is, in its nature, unsatisfactory, as no person can be compelled to make an affidavit; nor to state more of the matter to which he deposes, than he thinks

fit to disclose. It sometimes happens, therefore, that after great expense to the parties, and a long and laborious occupation of the time of the Court, in the comparison of affidavits, the Court, though acting with great anxiety, to save, if possible, the charge of further litigation, is unable to come to any safe conclusion upon the disputed facts, and is compelled to direct an Issue, and to send the matter to be tried by a Jury.

It appears to us that great expense might ultimately be saved to all parties in Bankruptcy, and that the Court might be most materially relieved, in the dispatch of that business, if the Lord Chancellor were to select, from time to time, from the lists of Commissioners acting in London, ten, or some such number, of Commissioners; who, in addition to their present duties, should sit as Commissioners of Appeal from the decisions of the Commissioners acting in the execution of Commissions in London; and should proceed by the *vivâ voce* examination of witnesses, wherever practicable, and should take down, and record all evidence, received by them, and should return the same to the Lord Chancellor; who, in case of any appeal from the judgment of such Commissioners, should act upon such recorded evidence, without permitting the parties to make a new case. We would recommend that three of these Commissioners should form a Court, to sit once in every week, or oftener if necessary; and that they should sit in successive weeks, by rotation; so that this Appellate duty might not materially interfere with their practice at the Bar; and inasmuch as the Lord Chancellor's selection would secure, for this purpose, the best talent and experience which could be found amongst the acting Commissioners, we think that the Public would be better served, at a comparatively small expense, by the gentlemen so selected, than by the establishment of a permanent court of Judges for that particular purpose; who, having no other employment, would not equally have the benefit of a continued intercourse with other Courts. We trust that many Appeals would go no further than this intermediate court. We think, however, that any party should be permitted to appeal from these Commissioners to the Lord Chancellor; except upon the question of costs alone.

We have framed certain Propositions, (166 *to* 173 *inclusive*), to give effect to these suggestions; and we have added one for the purpose of preventing London Commissioners from acting as advocates before other commissions, which it appears to us may sometimes expose them to the necessity of maintaining doctrines, contrary to their own recent deci-

sions; and thus tend to discredit the Jurisdiction, in the eyes of the Public. Our Propositions have, for the present, confined this intermediate Court, to appeals from commissions executed in London, in which the most important questions in Bankruptcy usually arise; it being at the option of the parties, and a frequent practice, to take out a commission in London, on great failures, although the bankrupt be resident at a distance in the country. If the experiment succeeds in London commissions, the principle may hereafter be usefully extended throughout the kingdom.

Before we quit this subject, we would observe, that certain times are fixed, by the Lord Chancellor, after each term, for the purpose of hearing Petitions; and the times so fixed were, until of late years, sufficient for the dispatch of Petitions in Bankruptcy, as well as of all other Petitions. But all Petitions have, of late years, much increased in numbers; and these fixed times not having been extended, and all other petitions having the precedence of bankruptcy, it now happens that the greater proportion of petitions in bankruptcy are postponed, until the last sittings of the court of the Lord Chancellor, and Vice Chancellor, before the long Vacation. This delay is often peculiarly inconvenient, in matters of bankruptcy; and we think it would be highly useful, if the time allowed for the hearing of Petitions after each term, except Easter term, were so extended, as to enable the court to dispatch all petitions in bankruptcy at the end of each term; and we desire to add, that in one of our Propositions, (152), we have suggested that much expense would be saved in the recovery of Costs in Bankruptcy, if the process of Subpœna and Attachment which are used, as to Costs in the Court of Chancery, were henceforth applied to Bankruptcy.

By the Act of the 53d of the late King, which establishes the office of Vice Chancellor, he is empowered to hear such causes, matters, and things, only, as the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, shall from time to time direct. We apprehend that the establishment of this Office was, at that time, considered as an experiment; and that the provision to which we have referred, though it might be suited to a temporary office, is ill adapted to the present state of the Vice Chancellor's court; and that it would increase the weight and authority of that Court, and add to its usefulness, if it were now placed upon the same independent footing, as the court of the Master of the Rolls; one of our Propositions is therefore adapted to that alteration. (*Prop.* 171).

It is now the understood right of any party, who is dissatisfied with an Order, pronounced by the Master of the Rolls, or the Vice Chancellor, upon a summary application made to him by Motion, to bring the same matter by way of appeal before the Lord Chancellor immediately, upon another motion, without the forms of appeal which are adopted in other cases, and without that guard against precipitation and vexatious litigation, which, in other cases, is afforded by the certificate of the appellant's Counsel, that it is fit the matter should be reheard.

A similar practice appears to have prevailed, before the establishment of the office of Vice Chancellor, with respect to motions, originally made before the Master of the Rolls; but special motions were then rarely made before the Master of the Rolls, and the inconvenience of the practice, being little felt, escaped observation. It appears to us, that a degree of facility is, by this practice, given to appeals upon motions, which tends, in so far, to render the courts of the Master of the Rolls and Vice Chancellor instruments of additional expence to the suitor: and that this unceremonious mode of appeal may have the effect of diminishing the respect, which is due to the station and important duties of those Judges. We are not, however, prepared to recommend that the suitor should be deprived of the opportunity of being heard before the superior Judge, upon a summary application by Motion, provided his appeal be guarded by a certificate of Counsel, that in his deliberate judgment the case is proper for a rehearing before the Lord Chancellor. (*Prop.* 175).

The efficacy of this Proposition must depend mainly on the caution and good faith with which Counsel may exercise the discretion thus reposed in them; and we hope that the signature to such a certificate will not degenerate into mere form, but that the Counsel, affixing their names thereto, will consider themselves in honour responsible for having exercised a due discretion. By the imposition of this check, we trust that the accumulation of Appeals on Motions may be prevented, and yet that the suitor may still have the benefit of the judgment of the superior tribunal, in all cases where the law or the fact may justly require reconsideration.

We have now brought to a close the Observations which we have felt it our duty to submit to Your Majesty.

It has been our object in this Report, to give a general view of the subject, and of the alterations which we recommend, without entering into minute details on particular

points; referring, for such explanation, to the Propositions themselves, and to the explanatory Paper before adverted to.

We humbly submit this our Report to Your Majesty's Royal Consideration.

Dated this 28th day of Feb. 1826.

ELDON. (L. S.)
GIFFORD. (L. S.)
JOHN LEACH. (L. S.)
CHA^{S}. WETHERELL. (L. S.)
SAM. C. COX. (L. S.)
ANT. HART. (L. S.)
STEP^{N}. LUSHINGTON. (L. S.)
W^{M}. COURTENAY. (L. S.)
ROB^{T}. PERCY SMITH. (L. S.)
J. H. MERIVALE. (L. S.)
N. C. TINDAL. (L. S.)
J. BEAMES. (L. S.)

Received this 7th day of March 1826.

ELDON, C.

BE IT REMEMBERED, That on the seventh day of March, in the seventh year of the reign of King George the Fourth, and in the year of our Lord one thousand eight hundred and twenty-six, The Right Honourable Robert Lord Gifford, Master or Keeper of the Rolls of the Court of Chancery, and the Right Honourable Sir John Leach, Knight, Vice Chancellor of England, two of the Commissioners named in the COMMISSION before mentioned, came into the Court of Chancery, and there delivered, *in open Court*, to the Right Honourable John Earl of Eldon, Lord High Chancellor of Great Britain, this RETURN to the said COMMISSION, being the *Report* thereto, with the *Propositions*, *Explanatory Paper*, and *Appendix*, in the said Report mentioned: All which the Lord High Chancellor aforesaid ORDERED to be filed in the Petty Bag Office, to be there kept upon RECORD.

PROPOSITIONS.

1.—That every Plaintiff, whether in a town or country cause, shall at all times be at liberty, without order, to sue forth a Subpœna to answer, returnable on a day certain, either in Term time, or in Vacation.

2.—That the form of every Writ of Subpœna, to appear and answer, be so altered, as to express, to the party to be served, the duty which is required from him, in obedience to the writ, and the consequence of his disobedience; and that, in like manner, the form of all other Writs of Subpœna, which are to be served upon the party, be altered for the same purpose.

3.—That a Writ of Subpœna, to appear and answer, be sued out for each defendant; and that the costs of all such writs, be costs in the cause.

4.—That a Defendant shall, after appearance, be allowed, without order, eight weeks time, to Plead, answer or demur to the plaintiff's Bill, in a town cause, and ten weeks in a country cause; but, whether in a town or country cause, if the defendant do not plead, answer or demur to the plaintiff's bill, within eight days after appearance, the plaintiff shall be entitled as of course, upon motion, to the common Injunction, for stay of the defendant's proceedings at Law; and that, whether in a town or country cause, the defendant shall not be permitted to Demur alone, after the expiration of fifteen days, from the day of appearance.

5.—That, when a Defendant is taken into the custody of the Sheriff, upon an Attachment, for not appearing to the plaintiff's bill, and the Sheriff returns a *Cepi corpus*, notwithstanding which, the defendant refuses or neglects to cause his appearance to be entered, for the space of fourteen days from and after the day the Attachment was returnable, the Court shall, upon production of the Sheriff's return to

such attachment, and a certificate from the plaintiff's Clerk in court, that the appearance has not been entered, upon motion or petition of course, order one of the sworn Clerks of the court to enter an Appearance for such defendant to the bill, in the same manner as is now the practice upon a defendant being brought into Court, upon a *habeas corpus*, for the like purpose, pursuant to statute 5th Geo. 2.

6.—That if a Defendant be in contempt, for want of an answer, and the Writ of attachment be returned by the Sheriff, *non est inventus*, the Plaintiff shall be at liberty to pass by the intermediate process of contempt, and to move, at once, for a Serjeant at arms; but no order for a Serjeant at arms shall be made, unless the motion be supported by an affidavit of the Solicitor of the plaintiff, or of his town agent, if the Writ of attachment was issued by such town agent, that due diligence had been used, for the purpose of ascertaining where the defendant was to be found, at the time of issuing the writ; and that he verily believes that the defendant was then to be found in the County, into which the writ did actually issue; and that he verily believed due diligence had been used, for service of the process, by the officer employed for that purpose.

7.—That if the Attachment be returned *Cepi corpus*, and the Defendant be in prison, in the custody of the sheriff, it shall no longer be necessary for the plaintiff to remove him by *Habeas*, to the bar of the court; but the plaintiff may, upon the return of the attachment, obtain an order of the Court, to be personally served upon the defendant, that the bill shall be taken *Pro confesso* against him, unless he shall answer, within three weeks from the time of service of that order; and if the defendant do not put in his answer accordingly, then, upon motion of course by the plaintiff, supported by an affidavit of personal service of the former order, and a certificate that no answer is filed, the order for taking the bill *pro confesso* shall be made.

8.—That if the Attachment be bailed by the Sheriff, and the Defendant be, by the subsequent process, committed to the prison of the Fleet, for want of his answer, it shall not be necessary for the plaintiff to proceed by the *Habeas*, the *Alias habeas*, the *Pluries habeas*, and the *Alias pluries habeas*, in order to take the bill *Pro confesso*; but that the order for taking the bill *Pro confesso* shall be made, on the return of the second or *Alias habeas*; there being, in all

cases, fifteen days, at least, between the return of the first *Habeas*, and the return of the second or *Alias habeas*.

9.—That in all cases, whether the Defendant's answer be filed in term time or vacation, the plaintiff shall be allowed two months to file Exceptions to such answer; but if exceptions be not filed within the two months, the answer shall thenceforth be deemed sufficient, and the plaintiff shall have no order to file exceptions, *nunc pro tunc*.

10.—That, if the Defendant do not submit to answer the Exceptions, the plaintiff shall refer the answer for Insufficiency, at the expiration of eight days, after the exceptions are delivered, but not before, unless in Injunction causes; and that, if the plaintiff do not, within six days after the expiration of the eight days, refer the answer for insufficiency, the exceptions shall be considered as abandoned by the plaintiff, and the answer shall thenceforth be deemed sufficient.

11.—That if the Defendant submit to answer Exceptions without a reference, then the defendant shall, without order, be allowed, in a town cause, one month's time, and in a country cause, six weeks time to answer the exceptions.

12.—That, if the Plaintiff do not, within a fortnight after a defendant's second or third answer to Exceptions is filed, refer the same for Insufficiency, on the old exceptions, such answer shall thenceforth be deemed sufficient.

13.—That, if the Plaintiff do refer the defendant's second or third answer to Exceptions, for Insufficiency, on the old exceptions, then the particular exception, or exceptions, to which he requires a further answer, shall be stated in the order.

14.—That, if upon a second reference of Exceptions, the Defendant shall submit to answer, without waiting for the Report, the defendant shall, without order, be allowed, unless he be already in contempt, in a town cause, three weeks time to answer, and in a country cause five weeks time, and no more.

15.—That, if the answer of the Defendant be certified insufficient, upon any reference of exceptions, then the Master shall, in his certificate, fix the time within which the de-

fendant shall file his further answer; and the Master's judgment, in that respect, shall be final.

16.—That, upon a third answer certified to be insufficient, the Defendant shall be examined upon interrogatories, to the points reported insufficient; and shall stand committed, until such defendant hath perfectly answered those interrogatories; and shall pay not only 4*l.* costs as heretofore, but also such further costs as the court shall think fit to award.

17.—That it shall not be necessary for the Plaintiff, in the case of Exceptions, to serve a subpœna for the defendant to make a better answer; and that the time allowed for the Defendant to answer the exceptions, shall run from the date of the Master's report of insufficiency, which shall be dated on the day on which it is signed; or where the defendant submits to answer the exceptions, without a report from the Master, there the time shall run from the date of the submission.

18.—That in all cases of reference of answers for Insufficiency the exceptions shall be considered as abandoned, and the answer deemed sufficient, at the end of a fortnight after the time of reference, unless the plaintiff shall, within the fortnight, obtain the Master's report; or unless the Master shall think fit to make his report at a future time, certifying thereby that such further time was necessary.

19.—That in cases where there is only one defendant to a suit, after the answer of the defendant is to be deemed sufficient, whether it be in term time or in vacation, the Plaintiff, if he mean to proceed by amending his bill, shall file such Amended bill within six weeks; and, if he require an answer, shall serve his Subpœna to answer within one week after filing his amended bill.

20.—That, in cases where there are two or more defendants, there the Plaintiff shall be at liberty to file an Amended bill, within six weeks after the last answer is to be deemed sufficient.

21.—That, in all cases of Subpœnas to answer Amended bills, the service shall be upon the Clerk in court.

22.—That, after the answers of all the defendants are to be deemed sufficient, whether it be in term time or in vaca-

tion, the Plaintiff, if he mean to proceed by setting down the Cause to be heard on Bill and Answer, shall set down the same with the Registrar before the expiration of one month, and shall serve the Subpœna to hear judgment, within a fortnight after the Cause is set down.

23.—That, after the answer of a defendant is to be deemed sufficient, whether it be in term time or in vacation, if the Plaintiff do not proceed in his cause, the Defendant shall be at liberty to move, at the first seal after the following term, upon notice, that the plaintiff's Bill do stand dismissed out of court, for want of prosecution; and such bill shall be dismissed accordingly, unless the plaintiff shall file his Replication, and appear upon the motion, and undertake to speed his cause with effect in the usual form.

24.—That, where it happens that the Defendant is entitled, according to the foregoing order, to move to dismiss the bill for want of prosecution, but the Plaintiff is not prepared to file his Replication, by reason that he has not obtained a sufficient answer from another defendant, or other defendants, there the Plaintiff may apply to the court for further time to file his Replication, by way of answer to the notice of motion to dismiss for want of prosecution; and the Court will then grant such further time to the plaintiff to file his replication as shall be reasonable, provided the plaintiff can satisfy the Court, that he has used due diligence to obtain a sufficient answer from such other defendant or defendants, but not otherwise.

25.—That, where the Plaintiff files his Replication, before he receives notice from the Defendant of a motion to dismiss for want of prosecution, he shall serve the Subpœna to rejoin, and obtain an order for a Commission, within one week from the filing of the replication; and if such order be obtained in Term time, then such Commission shall be, at the latest, returnable on the first return of the following term; and if such order be obtained in the Vacation, then such commission shall be returnable, at the latest, on the last return of the following term; the parties being then at liberty to execute the same in Term time, without order; and where such Commission is returnable, on or before the first return of the following term, then the Plaintiff shall give his Rules to produce Witnesses, and pass Publication in that term, and shall set down his Cause, to be heard in the following term. And where such Commission is returnable,

on or before the last return of the following term, there the Plaintiff shall give his Rules to produce Witnesses, and pass Publication, in the next term, and shall set down his Cause to be heard in the third term, and if the Plaintiff shall make default herein, then, upon application by the Defendant, upon motion of course, or by petition without service, the plaintiff's Bill shall stand dismissed out of Court, with costs.

26.—That, in all cases the Subpœna to rejoin shall issue, without order for that purpose, and be made returnable immediately, and shall be served on the Clerk in court,

27.—That, after Replication filed, the Plaintiff shall not be permitted to withdraw his replication and Amend his bill, without special order, obtained upon a notice of motion, stating the matter of the proposed amendment.

28.—That a Plaintiff may, before Replication, obtain one order to Amend his bill, as of course; but, for the purpose of avoiding amendments for delay or vexation, no further order shall be obtained by the plaintiff to amend his bill, unless in cases of mere formal amendment, until the Draft of the intended Amended bill has been settled by Counsel, and has been signed by him, in testimony of his approbation thereof, nor unless the Plaintiff and his Solicitor, or the Solicitor alone, if the plaintiff be abroad or under incapacity, do make an affidavit, that the Draft of the intended bill has been so settled and approved by Counsel, and that the amendment is not intended for the purpose of delay or vexation, but because it is considered to be material to the plaintiff's case.

29.—That every order obtained by the Plaintiff, to Amend his bill, shall contain an undertaking, on the part of the plaintiff, to amend his bill, and, if he require an answer, to serve the Subpœna to answer, within three weeks from the date of such order, and if the plaintiff make default herein, the order to amend shall thereupon become absolutely null and void; and, as to dismission for want of prosecution by the defendant, the cause shall stand in the same situation, as if no such order to amend had ever been made.

30.—That where the plaintiff requires an answer to an Amended bill, there a defendant shall, without order, be allowed in a town cause, five weeks, and in a country cause,

six weeks time, to plead, answer or demur, not demurring alone: but whether in a town or country cause, if the defendant do not plead, answer or demur to the plaintiff's amended bill, within eight days after appearance, the plaintiff shall be entitled, as of course, upon motion, to the common Injunction for stay of the defendant's proceedings at Law; and that, whether in a town or country cause, the defendant shall not be permitted to demur alone, after the expiration of fifteen days from the day of appearance.

31.—That where the plaintiff requires no answer to an Amended bill, there a defendant shall, without order, be at liberty to put in an answer to such bill, within ten days from the time of filing such amended bill.

32.—That the time which occurs between the last seal after Trinity term, and the first seal before Michaelmas term, and between the last seal after Michaelmas term, and the first seal before Hilary term, shall not be reckoned in the computation of time which is allowed to any party to make application for varying the minutes of a decree or order, or for staying the proceedings under a decree or order; nor in the computation of time, which is allowed to a defendant, to answer, plead, or demur, to an original bill, or an amended bill, or to answer exceptions; nor in the computation of time, which is allowed to a plaintiff, to amend his bill, or to file exceptions to a defendant's answer.

33.—That in all cases where the plaintiff is directed to pay to the defendant the costs of the suit, the defendant shall be allowed, on taxation, the costs of every Amendment made to the bill, by the plaintiff, unless it be deemed that the amendment was rendered necessary by the default of the defendant; the several sums which were paid by the plaintiff, at the times of the amendments, according to the course of the Court, being deducted therefrom.

34.—That in all cases where upon taxation, a plaintiff, who has obtained a decree with costs, is not allowed the costs of any Amendment made to the bill, upon the ground that such amendment was unnecessarily made; there the defendant's costs, occasioned by such amendment, shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

35.—That, upon the allowance of a Plea or Demurrer, the

plaintiff shall pay to the defendant the taxed costs, as between party and party; and where such plea or demurrer is to the whole bill, there the plaintiff shall also pay to the defendant the further taxed costs of the suit, as between party and party; unless, in case of a plea, the plaintiff shall undertake to reply to the plea, and then the costs shall be reserved; or unless the Court shall think fit to make other order to the contrary.

36.—That, upon the over-ruling a Plea or Demurrer, the defendant shall pay to the plaintiff the taxed costs, as between party and party; unless the Court shall think fit to make other order to the contrary.

37.—That, where the plaintiff obtains a decree with costs, there, upon taxation, the plaintiff shall be allowed the taxed costs which had been occasioned to him by the Insufficiency of the defendant's answer or answers; such sum or sums being deducted therefrom as were paid by the defendant, according to the course of the Court, on his answering the exceptions.

38.—That all Writs in process of Contempt, in town causes, may be made returnable immediately, without order; and that all writs in process of contempt, in country causes, may be made returnable in vacation, so that there are fifteen days between the teste and the return of the writ; and that upon all process of contempt, the party in contempt do pay the taxed costs; such costs to be certified by the adverse Clerk in Court.

39.—That, in all cases where a Defendant is in Contempt for want of an answer, and files his answer, he shall be entitled to an order to be discharged as to such contempt, upon payment or tender of the costs of contempt; but he shall not, by the receipt of such costs by the plaintiff, be so far discharged from the contempt, as to make it necessary for the plaintiff, if the answer be insufficient, to begin the process of contempt *de novo;* but the plaintiff shall, in such case, take up the process of contempt, at the point to which he had before proceeded.

40.—That every person, intended to be examined as a Witness in the Examiner's Office, be duly served with a Subpœna *ad testificandum;* whereon should be indorsed a note of the day and hour when the witness is required to

attend: and that no person, except the Solicitor in the cause, be examined as a Witness by the Examiner, unless, at the time of his examination, he produce the Subpœna; or satisfactory evidence to be given that such subpœna has been duly served.

41.—That the personal production of a Witness, at the seat of the opposite Clerk in court, as required by the present practice, be in future dispensed with.

42.—That the Examiners of the court of Chancery shall, in future, have power to administer the Oath to all witnesses, produced before them for examination, as fully and effectually as the same is now administered by the Masters of the court.

43.—That the same Examiner be at liberty to cross-examine, as well as to examine, the same witness.

44.—That the Depositions of every witness examined, either before the Examiner, or before Commissioners in the country, be taken down in the first person, instead of the third, the pronoun "*I*," being substituted in all cases for the words "*this deponent;*" and that the other words of every deposition be also varied, whenever necessary, so as to correspond with this alteration.

45.—That the last Interrogatory, now commonly in use, be altered, by omitting the words "*which may be of any "benefit or advantage, or material to the said complainant "(or defendant");* and inserting, in lieu thereof, the words "*material to the subject of this your examination.*"

46.—That, for the better dispatch of the business of the Examiner's office, a second sworn clerk be added to the office of each of the Examiners.

47.—That it would be expedient that Commissions for the examination of witnesses in the country, should no longer be directed to Commissioners named by the parties; but that the Lord High Chancellor should nominate or appoint a certain number of persons, at his discretion, being resident in London, and Barristers of not less than five years standing, to act as Commissioners in the country, at any distance from London exceeding twenty miles, and not exceeding such greater distance as shall, from time to time, appear to the Lord Chancellor to be expedient, in that behalf: and

that all such Commissions should be directed to, and executed by, one of the persons so to be nominated and appointed, unless it should happen that, at the time of applying for any such Commission, all the said persons should be actually engaged in the execution of other country Commissions previously issued.

48.—That it would be further expedient, in order to provide for the execution of such Commissions, when it may happen that, at the time of applying for any such Commission, all the said persons shall be actually engaged in the execution of other country Commissions; and also to provide for the execution of all other Commissions, for the examination of witnesses in the country, at any distance from London, exceeding the limits to be prescribed by the Lord High Chancellor, as aforesaid, that the Lord High Chancellor should nominate a certain number of other persons, at his discretion, who are resident in the country, to act as Commissioners, for the examination of witnesses, within each county, city, or populous town, or other district, or division, to be designated and described by him; such persons being Barristers at law, where the same can conveniently be found: and that one of such persons, alone, should execute every such Commission, although the same should be directed to two of such persons, in order that he who is secondly named might proceed in the execution of the Commission, in case the person, therein first named, should be unable or unwilling to attend.

49.—That, in order to secure the convenient execution of such Commissions within the limits to be prescribed by the Lord High Chancellor, as aforesaid, when it shall happen that all the said persons, nominated by him, and resident in London, are actually engaged in the execution of other Commissions; and also to secure the like convenient execution of all other Commissions in the country, at any distance from London, exceeding the limits so prescribed, it would be further expedient, that the two persons to whom such Commissions shall be directed, should be selected from the list of those who are to be nominated and appointed by the Lord High Chancellor, as last aforesaid, by such Master of the court of Chancery as shall happen to be in attendance at the public office; which Master shall also appoint the place for the execution of every such Commission, having regard to the residence of the Commissioners and Witnesses: and, as far as may be consistent with those circumstances, maintaining a due rotation among the persons so nominated and

appointed by the Lord High Chancellor; and that where such Commissions are executed by the persons therein secondly named, the cause of the absence of the person therein first-named should be certified, under the hands of the Solicitors attending the execution of the said Commission, on behalf of the several parties, and also under the hand of the acting Commissioner, speaking to his knowledge or belief; and that such certificate should be annexed to and returned with the Commission.

50.—That, in order to secure the competent execution of all Commissions in the country, whether within or beyond the limits to be prescribed by the Lord High Chancellor, as aforesaid, the remuneration to be paid to the acting Commissioner, should be after the rate of 5 guineas *per diem*; which as to the Commissioners sent from London, but not as to the Commissioners resident in the country, should include the time of travelling, computed at the rate of 70 miles *per diem;* and that each acting Commissioner should also be paid an addition of 1 shilling, for each mile of distance which he shall necessarily travel, for the purpose of such Commission; but the 5 guineas *per diem*, so paid to the acting Commissioner, should include the expense of lodging and maintenance.

51.—That, in future, in the execution of all country Commissions, neither lodging nor maintenance should be provided at the expense of the parties, either for the solicitors, clerk, or witnesses; but that, in lieu thereof, the daily fee for the attendance and expences of each Solicitor on such Commission, should be increased to the sum of *3l.*; and the daily fee for the attendance and expenses of the Clerk of the Commission, who is to be named by the acting Commissioner, should be increased to the sum of 30*s.*; and that the several Witnesses should be paid for their time and attendance according to their degree, as in courts of Law.

52.—That, in all other respects, the forms, rules, and regulations, which now prevail in the issuing and execution of Commissions in the country, should continue to be adopted, as nearly as may be.

53.—That Publication shall not in future be enlarged, except upon a special application to the Court for that purpose, supported by affidavit, and at the expense of the party applying, unless otherwise ordered by the Court.

54.—That, in all suits brought for the establishment of Wills, where the Heir at law is, by the course of the Court, entitled to an Issue *devisavit vel non*, neither party shall, before the hearing, enter into Evidence either to support or to question the will, other than that the plaintiff must examine the attesting witnesses to the will upon the usual interrogatories in that behalf, and that the heir at law may cross-examine such witnesses.

55.—That in all cases, the Subpœna to hear Judgment shall be served upon the Clerk in court.

56.—That where a Cause, which is set down to be heard, has either been disposed of in another Court, or has become abated, or has been compromised, it shall be the duty of the Solicitor of the plaintiff, in order to save unnecessary expense to the parties, and to avoid the time of the Court being lost by inefficient Causes being found in the Paper, to certify the same to the Registrar, in order that he do note the fact by an entry in the Cause book, kept at the Registrars' office, opposite to the name of such cause; and such solicitor, in respect of such entry, if made in due time, shall be allowed a fee of six shillings and eight-pence, and no more.

57.—That where a Cause, which stands for Hearing, is called on, but not decided, by reason of a want of parties, or other defect in the plaintiff's case, and the cause therefore goes out of the paper, and it becomes necessary to set down the cause a second time, and to serve new subpœnas to hear judgment; there the defendant or defendants shall be allowed the taxed Costs, occasioned by the first setting down and hearing, although he or they do not obtain the costs of the suit.

58.—That where a Cause, which stands for hearing, is called on and not decided, but does not go out of the paper, being adjourned, upon payment of the Costs of the day; there the party to pay the costs of the day, whether before the Lord High Chancellor, Master of the Rolls, or Vice Chancellor, shall pay the sum of 10*l.* unless the Court shall make other order to the contrary.

59.—That, in future, any person may be at liberty to require from the Registrars' Office a copy of the title and ordering part only of any Decree or Order; paying for

the same at the present rate or price of one shilling and sixpence for the first side, and one shilling for every other side.

60.—That in consequence of the great increased attendance of the Registrars in Court, by reason of the establishment of the office of Vice Chancellor, and in consequence also of the increased quantity of business which has been dispatched since the establishment of that Office, it is expedient that the present number of four Deputy or Sub-Registrars be increased to six; and that each be allowed two Clerks; and the Registrars' Office do continue open till 3 o'clock in the afternoon, and re-open at 6, instead of shutting at 2 o'clock, and re-opening at 5, as at present.

61.—That it is expedient that the Lord High Chancellor, the Master of the Rolls, and the Vice Chancellor, should take into consideration the present state of the profits and fees of the several persons now employed in the Registrars' Office; and the effect that will be produced by the proposed increase of the number of Deputy Registrars, and the diminished expense of Office Copies of decrees and orders; and should thereupon suggest what shall appear to be reasonable with respect to the future emoluments of the Registrars and their Clerks.

62.—That the Registrars' Office being of great importance to the due dispatch of the business of the Court, it is expedient that the Lord High Chancellor, the Master of the Rolls and the Vice Chancellor, should be empowered from time to time to make such rules and regulations, with respect to the admission and qualification of Clerks in the Registrars' Office, as shall appear to be best calculated to secure a succession of persons, who may be competently qualified to fill the office of Registrar.

63.—That no application shall be permitted to vary the Minutes of any decree or order, unless the same be made within 3 weeks after the decree or order pronounced.

64.—That all Petitions to the Court, and all Cases stated by the order of the Court for the opinion of a court of Law, after the Judges have certified their opinion, shall be filed in the Report Office, before the order of the Court in any such matter is acted upon.

65.—That no Master do, without a special order of the Court, proceed upon any Decree or order referred to him, unless such decree or order be brought into his office, by the party first entitled to prosecute the same, within six weeks from the time when the same was pronounced; or by some other party entitled to prosecute the same, within eight weeks from the time the same was pronounced: and in such latter case the party so bringing in the decree or order shall, as to all proceedings in the Master's office, be thence forth considered as the party first entitled to prosecute the same.

66.—That, every Master do enter, in a Book to be kept by him for that purpose, the name or title of every cause or matter referred to him, and the time when the decree or order is brought into his office, and the date and description of every subsequent step taken before him in the same cause or matter, and the attendance or non-attendance of the several parties, upon each of such steps; so that such book may exhibit, at one view, the whole course of proceeding which is had before him, in each particular case.

67.—That, upon the bringing in of every Decree or order, the Master do issue his warrant, to the Solicitor bringing in the same, appointing a time to consider the matter of the said decree, or order, and requiring him not only to serve the same upon the Clerk in court of the respective parties, but also to give immediate notice to the several Parties in the cause, of the time so appointed.

68.—That, at the time so appointed for considering the matter of the said Decree or order, the Master do proceed to regulate, as far as may be, the manner of its execution; as, for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may be properly going on *pari passu*, and as to what particular matters interrogatories for the examination of the parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit, or by examination of witnesses; and in the latter case, if necessary, to issue his certificate for a commission, and if the Master should think it expedient so to do, he should then fix a certain time or times, within which the parties are to take any certain proceeding or proceedings before him.

69.—That, upon any subsequent attendance before him, in the same cause or matter, the Master, if he thinks it expedient so to do, shall fix a certain time or times, within which the parties are to take any other proceeding or proceedings before him.

70.—That where some or one, but not all the parties do attend the Master at an appointed time, whether the same is fixed by the Master personally, or upon a warrant, there the Master shall be at liberty to proceed *ex parte* if he thinks it expedient, considering the nature of the case, so to do.

71.—That, where the Master has proceeded *ex parte*, such proceeding shall not in any manner be reviewed in the Master's office, unless the Master, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance; such costs to be certified by the Master at the time, and paid by the solicitor before he shall be permitted to proceed on the warrant to review.

72.—That, when a proceeding fails by reason of the non-attendance of any party or parties, and the Master does not think it expedient to proceed *ex parte*, there the Master shall have power to award such costs as he thinks reasonable, to be paid to the party or parties attending, by the absent party or parties, or by his or their solicitor or solicitors, or clerk or clerks in court personally, as the Master in his discretion shall think fit, and the payment of such costs shall be enforced in like manner as costs awarded by the Court.

73.—That, where the party, actually prosecuting a decree or order, does not proceed before the Master with due diligence, there the Master shall be at liberty, upon the application of any other party interested, either as a party to the suit, or as entitled to come in before the Master under the decree, to commit to him the prosecution of the said decree or order, and from thenceforth neither the party so making default, nor his solicitor, shall be at liberty to attend the Master in the prosecution of the said decree or order.

74.—That, upon any application made by any person to the Court, whether to obtain the conduct of a cause upon

the ground of delay in the party prosecuting the decree or order, or for any other purpose, the Master, if required by the person making the application, shall certify to the Court the several proceedings which shall have been had in his office in the same cause or matter, and the dates thereof.

75.—That, upon every general Report, or report in the nature of a general report, made by the Master to the court, in any cause or matter hereafter referred, the Master shall, at the foot of his Report, certify whether the decree or order has or has not been prosecuted with reasonable diligence; and if he shall be of opinion, that reasonable diligence has not been used, then he shall certify the grounds of such opinion to the Court, making such observations thereon as he may think fit.

76.—That every Master be at liberty, without order, to proceed in all matters *de die in diem*, at his discretion.

77.—That every Warrant for attendance before the Master, shall be considered as peremptory, and the Master shall be at liberty to continue the attendance beyond the hour, and during such time as he thinks proper, giving previous notice in the warrant of his intention so to do; and that he be empowered to increase the fee for the solicitor's attendance in proportion to the time actually occupied.

78.—That, where by any decree or order of the Court, Books, papers or writings are directed to be produced before the Master, for the purposes of such decree or order, it shall be in the discretion of the Master to determine what books, papers, or writings are to be produced, and when, and for how long they are to be left in his office; or, in case the Master shall not deem it necessary that such books, papers, or writings should be left or deposited in his office, then that he may give such directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.

79.—That all parties, accounting before the Masters of this court, shall bring in their Accounts to the Master in the form of Debtor and Creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the Master shall direct.

80.—That all such Accounts, when passed and settled by the Master, shall be entered in a book to be kept for that purpose in the Master's Office, as is now the practice with respect to Receivers' Accounts; and with proper indexes, in order to be referred to, as occasion may require; and that the said accounts be verified by affidavit.

81.—That, if the Master's conclusions as to a matter of Account be not objected to, he do not state the account in his Report, or by way of schedule thereto, but refer to the same as entered in such book, inserting in his report only the general balances; but if the Master's conclusions as to a matter of Account be objected to, then the Master is to state in his Report, or by way of schedule, the several items of the account which form the subject of the objection.

82.—That it shall be competent to the Master, if, from the nature or extent of the Accounts directed to be taken, it be expedient so to do, to refer the same or any branch thereof, with the consent of the parties interested, to some Accountant or other person; and the result of such account, as found by such accountant or other person, shall be stated by the Master in his report, in the same manner as if the account had been taken by himself; and it shall not be competent to any party to object to the said account before the Master, or to take exceptions to the report thereupon, upon any other ground than such as they might have proceeded upon, if the account had been taken before the Master.

83.—That if such a reference is proposed in any case in which any party is an infant, lunatic, or married woman, then, if the guardian committee, or next friend of such person respectively, shall signify his consent, the Master shall consider and determine whether, in his judgment, it is for the benefit of such infant, lunatic, or married woman, that the Accounts should be taken in the manner proposed; and if he shall be of opinion that it will be for the benefit of such party, then he may refer the same accordingly.

84.—That in all cases in which the Master shall think fit to make a reference of the nature here proposed, he shall state in his Report his reasons for so doing; and, in the cases of persons under disability, shall also state that it was for their benefit to make such Reference.

85.—That no Exception to a Master's Report upon matters of Account, in respect of any item of account, be permitted, unless such single item, or several items depending on the same question, shall amount to 50*l.* or upwards; or unless the Master shall think fit to certify, that the exception involves some principle of law or equity, which in his judgment renders it expedient that it should be considered by the Court.

86.—That the Master, in acting upon the Order of the Court, 23d April 1796, shall be at liberty, upon the appointment of a Receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of the Receiver's Accounts and payment of his Balances, to fix either longer or shorter periods, at his discretion; and when such other periods are fixed by the Master, the regulations and principles of the said order, shall in all other respects be applied to the said Receivers.

87.—That, in every order directing the appointment of a Receiver, there be inserted a direction that such Receiver shall manage, as well as set and let, with the approbation of the Master; and that in acting upon this direction, it shall not be necessary that a petition be presented to the Court in the first instance, but the Master, without special order, shall receive any proposal for the management of the estate from the parties interested, and make his report thereon, which report shall be submitted to the Court for confirmation, in the same manner as is now done with respect to reports upon such matters made upon a special reference.

88.—That all Affidavits which have been previously made and read in Court, upon any proceeding in the cause or matter, may be used before the Master.

89.—That where, upon an inquiry before the Master, Affidavits are received, there no affidavit in reply shall be read, except as to new matter which may be stated in the affidavits in answer; nor shall any further affidavits be read unless specially required by the Master; and all affidavits shall be deemed to be sufficiently filed, when lodged or left in the Master's Office.

90.—That the Master do not receive further Evidence as to any matter depending before him, after issuing the warrant on preparing his Report; but that he do not issue such

warrant without previously requiring the parties to show cause why such warrant should not issue.

91.—That no Warrant to Review any proceeding in the Master's Office be allowed to be taken out, except by permission of the Master, upon special grounds to be shown to him for that purpose; and the costs of such review, when allowed, shall be in the discretion of the Master.

92.—That the Master have power, at his discretion, to examine any Witness, *vivâ voce*, and in such case the subpœna for the attendance of such witness, shall upon a note from the Master, be issued from the Subpœna office; and that the evidence upon such *vivâ voce* examination, to be taken down by the Master, or by the Master's clerk, in his presence, and preserved in the Master's Office.

93.—That, in all matters referred to him, the Master be at liberty, upon the application of any party interested, to make a Separate report or reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court.

94.—That where a Master shall make a Separate report of Debts or legacies, there the Master shall be at liberty to make such certificate as he thinks fit with respect to the state of the Assets; and any person interested, shall thereupon be at liberty to apply to the Court, as he shall be advised.

95.—That the Master be at liberty to examine any Creditor, or other person coming in to claim before him, either upon written interrogatories, or *vivâ voce*, or both, as the nature of the case may appear to him to require; the evidence upon such examination being taken down at the time by the Master, or by the Master's clerk in his presence, and preserved, in order that the same may be used by the Court if necessary.

96.—That no order shall be made for referring any matter, depending before the Court, for Scandal or Impertinence, unless written Exceptions in respect of such scandal or impertinence have been previously taken and signed by Counsel, describing the particular passages which are considered as scandalous or impertinent; and such exceptions shall be referred to one of the Masters of the court, as in the case of exceptions to the sufficiency of an answer: and the attention

of the Master shall be confined to the matter of the exceptions; and such exceptions shall be considered as abandoned, unless the party referring shall within a fortnight obtain the Master's report, or unless the Master shall think fit to make his report at a future day, certifying thereby that such further time was necessary. And where the Master shall allow any one or more of such exceptions upon a reference for impertinence, or the party shall submit to any one or more of such exceptions on the like reference, there the costs of such reference shall be in the discretion of the Master.

97.—That, if any party wishes to complain of any matter introduced into any State of facts, affidavit, or other proceeding before the Master, on the ground that it is scandalous or impertinent, he shall be at liberty, without any order of the Court, to make out a warrant for the Master to examine such matter; and the Master shall have authority to expunge any such matter, which he shall find to be scandalous or impertinent; and in cases of impertinence only, he shall have the like discretion, in respect of costs, as is given to the Master by the last Proposition: and his decision in these respects shall be final.

98.—That wherever a defendant's answer shall have become insufficient, or defective, by the expunging of any scandalous or impertinent matter, and the Master shall certify his opinion that the defendant ought to have liberty to put in a further answer to so much of the bill as the matter so expunged related to, the defendant shall be at liberty to file such further answer within such period as the Master shall fix at the time of the expunging, unless the plaintiff shall then signify his wish to accept such answer as it stands, and the defendant shall consent to abide thereby, or unless the plaintiff shall then express his intention to except to any other part of the answer for insufficiency; in which case he shall bring in his exceptions, within the time allowed by the rule of the Court in that behalf, without an order for that purpose; and if the Master allows such exceptions, he shall then fix the time within which the defendant is to put in his further answer, as well in respect thereof, as in respect of the parts rendered insufficient by the expunging as aforesaid: and his decision shall be final.

99.—That in case of Examinations taken in the Master's Office being objected to as insufficient, the party shall, with-

out an order, bring in his exceptions, which shall be argued before the Master, in like manner as upon references of answers for insufficiency: and the Master's decision thereon shall be final.

100.—That the Master's Report upon all references for scandal or impertinence, or for the Insufficiency of answers or examinations, shall be final, and no exception shall be permitted to be taken thereto, unless the Master shall certify that it is a fit case for exception to the report, if the parties are so minded; and where the Master shall find any matter to be scandalous or impertinent, there the Master shall be at liberty to expunge the same without order; and, in like manner, the Master shall be at liberty, without order, to tax the costs of scandal and impertinence, and of the insufficiency of any answer or examination.

101.—That the Masters, in deciding on the sufficiency or insufficiency of any answer or examination, do take into consideration the Relevancy or materiality of the question referred to.

102.—That in cases where estates or other property are directed to be sold before the Master, there the Master may be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place and by such person as he shall think fit; and that the Master, except in very special cases, do not permit his own clerk or any other person to go from London for the purpose of such Sale; and that if any solicitor, or solicitor's clerk, from London, shall attend such sale without permission of the Master, the costs of such attendance shall not be allowed in taxation.

103.—That, where a Master is directed to settle a conveyance, or to tax costs, *in case the parties differ about the same*, there the party claiming the costs, or entitled to prepare the conveyance, shall bring the bill of costs or the draft of the conveyance into the Master's Office, and give notice of having so done to the other party; and that at any time within eight days after such notice, such other party may have liberty to inspect the same, without fee, and may take a copy thereof, or not, as he thinks fit: and at or before the expiration of the eight days, or such further time as the Master shall in his discretion allow, he shall then either agree to pay the costs, or adopt the conveyance (as the case

may be), or signify his intention to dispute the same; and the Master shall then proceed to settle the same, according to the practice of the Court.

104.—That the Solicitor employed for the Plaintiff in a Creditor's suit, shall not, nor shall his partner or clerk, although such clerk be himself a solicitor in any case, be employed for any Defendant, and that no Solicitor employed for any Party in a cause, nor his partner or clerk, shall be employed for the Receiver in the cause; or for any person, who purchases property under a decree of the court in the cause, or who, not being a party, is in any other manner incidentally connected with the cause.

105.—That, whenever upon any proceeding before a Master the same Solicitor is employed for two or more parties, such Master may, at his discretion, require that any of the said parties shall be represented before him by a distinct Solicitor, and may refuse to proceed until such party is so represented.

106.—That every Solicitor be at liberty to register, in a book to be kept in the Public office for that purpose, the name or names of one or two sufficient Clerk or Clerks, to be approved of by the Master of the day, for the purpose of attending all proceedings in the Master's offices which he does not attend in person, or by his Clerk in court; and that the Masters be at liberty to disallow the attendance of any Clerk who is not so registered. And in all cases the Master is to be at liberty to call for the attendance of the Solicitor himself, if he thinks fit.

107.—That, if at any time it shall become necessary, for any special reason shown to the Master of the day, for a Solicitor to appoint any other Clerk for the above purpose, he be required forthwith to register in the said book such other Clerk, to be approved of by the Master of the day.

108.—That, if more than one Clerk be so registered, the same Clerk who may have commenced attending upon any distinct branch or subject of proceeding before either of the Masters, be required to continue his individual attendance, until such separate matter be completed, unless some special reason be shown to, and allowed by the Master, to the contrary.

109.—That whenever, after a decree, and pending proceedings in the Master's Office, a Supplemental bill becomes necessary, there it shall be in the discretion of the Master, upon a view of the particular circumstances of the case, to fix the time, within which the defendant or defendants shall put in his or their answer or answers to such supplemental bill; and shall further certify whether the Supplemental Cause is fit to be set down and heard as a Short Cause.

110.—That it is expedient that the Masters be, *in future*, paid partly by salaries and partly by fees.

111.—That it is expedient that the Masters should cease to receive profit from Copy money.

112.—That it is expedient that the suitors in the Court of Chancery should continue to pay proper and reasonable fees for Copies and proceedings in the Master's Offices.

113.—That in future, all Copies in the Master's Office be paid for at the rate of four-pence per folio only.

114.—That no party be in future required to take any Copy from the Master's Office, unless where necessary for the due proceeding in the matter depending before him, and that the Master's judgment in that respect be final.

115.—That in the taxation of costs of suit, either between party and party, or between solicitor and client, no person be allowed the costs of the Copy of any paper or document originating in the Master's Office, or brought in before him, unless such copy shall have been either made in the Master's Office, or transcribed from a copy made therein, and taken by the party claiming to be allowed the costs of such second or other copy.

116.—That it would be expedient that the practice of receiving Gratuities by the Clerks in the offices of the Masters of the Court, should be discontinued; and that, in lieu thereof, a liberal remuneration should be secured to them, bearing a just proportion to the business actually done by them.

117.—That it is desirable that the Lord High Chancellor, the Master of the Rolls, and the Vice Chancellor, should

take into consideration the present state of the emoluments of the Masters, and also of their clerks; and the effect which will be produced by taking from them the profit of copy-money; and should, thereupon, suggest what shall appear to be reasonable with respect to the future emoluments of the said Masters and their clerks; and with respect to the fees hereafter to be paid by the suitors of the Court in the Masters' offices.

118.—That, in order to relieve persons in Prison, from the expense of a Master's attendance, to take affidavits or answers, the Lord High Chancellor do, by one or more commission or commissions under the great seal, nominate and appoint the Warden, keeper, or other chief officer of every Prison within the city of London or the bills of mortality, and their deputies, to be Masters Extraordinary of the high court of Chancery, for the purpose of taking and receiving all and every such Affidavits and Answers, as any person or persons, within any such prison, shall be willing or desirous to make, before any such persons, in or concerning any cause, matter, or thing, depending or hereafter to be depending in the high court of Chancery, or in any matter of Bankruptcy, and for no other purpose; and the person so taking such affidavit or answer, shall, in respect thereof, be entitled to receive a fee of one shilling, and no more.

119.—That the Masters Extraordinary of this court, shall be at liberty, in future, to take any affidavit or acknowledgment of deeds or recognizances, or do any other act, incident to the office of Master Extraordinary in Chancery, at any place which is distant ten miles, or more, from London.

120.—That all Causes originally heard by the Master of the Rolls, or the Vice Chancellor, shall be heard, on Further Directions, by the same Judge; unless the party, entitled to set down such cause for hearing on further directions, shall think fit to have such cause heard by the Lord Chancellor.

121.—That, in future, no day shall be named in any Order for payment of money into Court, or for the transfer of stock into Court; but such order shall be general, and the party, to make the payment or transfer, shall have secured to him such time as the Court may think reasonable

for that purpose by the order, restraining the party who obtains it from serving a Writ of execution of the order, until after that time.

122.—That whenever any Order is hereafter made by the Court, that money shall be laid out, by the Accountant General, in the purchase of Stock or Exchequer bills, or that Dividends to be received by the Accountant General, shall, from time to time, be invested, there the Accountant General shall at once proceed to lay out such money, or to invest such dividends, from time to time, without waiting for the written request from the Solicitor, which is required by the present practice. And whenever Exchequer bills, purchased by the Accountant General, or deposited with him, become payable, there also the Accountant General shall receive the amount, due upon such bills, and re-invest the same in the purchase of other exchequer bills, without waiting for the Solicitor's request.

123.—That, where the resistance to the payment of a Legacy arises wholly from a doubt as to the Construction of the gift in the Will, there, either the legatee or the executor, upon a Petition without bill, may, if it appear expedient to the Court, obtain an immediate Judgment upon the point; and the Court shall thereupon make such order as the case appears to require, either with respect to the payment of the legacy, or the costs of the proceeding; and such order shall be subject to the same rules of re-hearing or appeal, as if made in a cause.

124.—That, it appearing upon the evidence that doubts have been entertained whether, upon a bill filed by any party interested, or by an executor or other trustee, for the Construction of any will or other instrument, or for the direction of the Court on any matter of Trust, it is in the discretion of the Court to confine its decree to the particular relief prayed by the bill, without taking upon itself the general execution of the trusts of the will or other instrument, it is expedient that it be considered that such discretion does, in all cases, reside with the Court.

125.—That, in all cases where the defendant may protect himself by demurrer or plea, from discovery either to the whole or to a part of the bill, there the defendant shall be at liberty to insist upon the same matter of defence by way of answer; and shall thereby be protected from all further

discovery, either to the whole bill or to the part in question, as the case may be, except as to discovery to which the plaintiff would have been entitled in support of the plea, if the defendant had made his defence by plea instead of answer; and that where the plaintiff shall except to such answer of the defendant, on the ground that the same defence, if made by demurrer or plea, would not have protected the defendant from further discovery, there the plaintiff, in the place of setting down the exception before the Master, shall be at liberty to move the Court that his exception be allowed; and the Court shall make order thereupon accordingly. And wherever the sufficiency of defence in that respect is declared by the Court, or is admitted by the plaintiff without exception, there the plaintiff shall proceed in his cause in the same manner in all respects, as he would have been entitled to do by the present practice of the Court, if the defendant had pleaded or demurred, either wholly or partially, to the bill.

126.—That to every Bill, where the common Injunction to stay proceedings at Law is sought, there shall be annexed an Affidavit, made by the plaintiff and his solicitor, stating that the bill is not filed for delay, and only for the purpose of obtaining equitable relief, or discovery in aid of a proceeding at law; and the plaintiff shall further state in such affidavit, the time when he was first advised of his alleged equitable title; and the solicitor shall further state in such affidavit, the time when he was first apprised of, or was aware of such alleged equitable title. And where it shall happen, from unavoidable circumstances, that an affidavit cannot be made by the Plaintiff, there an affidavit, to the effect aforesaid, as far as the same respects the solicitor, shall be made by the Solicitor alone; and the solicitor shall add to his affidavit a statement of the circumstances, by which the plaintiff is prevented from making the affidavit hereinbefore required, in order that it may appear that the same were unavoidable.

127.—That, where an Executor or Administrator is Plaintiff in a suit for the Administration of the Assets of his testator or intestate, there he shall annex to the Bill a Schedule, containing a statement of his receipts and payments as such executor or administrator, and of the Balance then in his hands on that account, and also a statement of all the outstanding property of the said testator or intestate, and of the debts due to him, as far as the same have come to his

knowledge; and shall verify the same by an Affidavit, to be annexed to his bill. And that, where an Executor or Administrator shall be Defendant in a suit for the Administration of the assets of his testator or intestate, there he shall in like manner annex to his Answer a similar Schedule, containing a statement of his receipts and payments as such executor or administrator, and of the Balance then in his hands on that account, and also a statement of all the outstanding property of the said testator or intestate, and of the debts due to him, as far as the same have come to his knowledge; and shall verify the same by his answer. And that no such Bill or Answer shall be filed in the Six Clerks Office, unless these directions be complied with: and, in order to enable the Six clerk to act in that respect, there shall, on every such bill, be indorsed by the Clerk in court, that it is a "*Bill for the administration of assets;*" and on every such answer, there shall in like manner be indorsed by the Clerk in court, that it is an "*Answer to a bill for the administration of assets.*"

128.—That, at any time after the filing of any such bill or answer, the Court may make such order as shall be expedient for the security of the Balance so appearing to be in the hands of the Executor or administrator, and of the outstanding property of the said testator or intestate, and of the debts due to him, upon the summary application of any party to the suit, or of any creditor or other person interested in the assets to be administered, although not a party to the suit.

129.—That, in order to enable Creditors or other persons interested in the Administration of the assets of a testator or intestate, who are not parties to the suit, to make such applications, any person upon applying to any Clerk in court, and producing an office copy of an affidavit filed, that he is either a creditor or other person interested in the administration of the assets; or is authorized by some other person whom he believes to be a creditor or person interested in such administration, shall be at liberty to read any such Bill or Answer in the Six Clerks office, upon paying for the same a fee of 6*s.* 8*d.*; and may take an office copy of such part of the bill or answer as he thinks fit.

130.—That if, after the filing of a Bill by any Executor or administrator for the Administration of the assets of his testator or intestate, or after a Subpœna served upon any

executor or administrator, upon a bill filed by any other person, for the administration of the assets, such executor or administrator shall make any payment to any Creditor of his testator or intestate, which shall operate to the prejudice of any other creditor of equal degree, then to the extent to which such payment shall so operate to the prejudice of any other creditor of equal degree, the same be disallowed by the Master of this court; before whom the accounts of such executor or administrator shall be taken.

131.—That, after the institution of any suit for the Administration of the assets of any testator or intestate, the Executor or administrator may apply to the court for an Injunction to restrain the proceeding of a Creditor at Law, although no decree has been pronounced in the suit; such executor or administrator supporting his application by an affidavit, stating the actual balance in his hands in respect of the estate to be administered, and submitting to the immediate payment of such balance into Court, and to an immediate decree for an account, if the Court shall think fit so to order.

132.—That if an Executor or administrator, after the institution of any suit for the Administration of assets, omit to apply for the protection of the Court, afforded by the preceding Proposition, and shall suffer a Creditor to proceed to Judgment and Execution at Law, such executor or administrator, on passing his account before the Master, shall not be allowed the costs of such proceeding at law, nor the amount of such execution, so far as the same exceeds the proportion of debts which other creditors of equal degree will be entitled to under the decree.

133.—That in all cases it shall be in the discretion of the Court, having regard to the circumstances of the assets, to allow or disallow Interest from the date of the report, to Creditors whose debts do not in their nature carry interest.

134.—That, for the purpose of enabling all persons to obtain precise information, from time to time, as to the state of any cause or other matter respecting which they are interested and may be desirous of being informed, and in order to give them an opportunity to watch the different proceedings therein, and to take the means of preventing improper delay in the progress thereof, any person, whether a

party or not, in the particular suit or matter inquired after, shall be entitled to apply to any Clerk in court for a certificate from the Six Clerks office, specifying therein the dates and description of the several proceedings which have been taken in such suit or other matter, in the Six Clerks office; and it shall be the duty of the Clerk in court, to whom such person shall so apply, whether he be or not concerned as Clerk in court in the cause or matter inquired after, forthwith to procure such certificate, and to deliver it to the person so applying, upon receiving the sum of 3*s*. 4*d*. for the same, and no more.

135.—That where a Bill is filed for an Account, and the defendant has put in his answer, submitting to account there, if the plaintiff afterwards desert his suit, so as to entitle the defendant to dismiss the bill for want of prosecution, the Defendant, if he think fit, instead of dismissing the bill, may apply to the Court, upon motion or petition, for a Decretal order for the account; and the defendant shall in all respects proceed upon such decretal order, if the court thinks fit to make it, as if his proceeding were under a decree at the hearing.

136.—That, where, upon a Bill filed for an Accoun t, the cause is set down for Hearing, there, if the plaintiff do not appear at the hearing, the Defendant, instead of dismissing the bill, may apply to the Court for a Decree for an account, and if the Court shall think fit to make such decree, the defendant shall proceed under the same, in all respects as if the decree had been obtained by the plaintiff.

137.—That wherever, after answer, it is apparent upon the pleadings, that some certain Decree must necessarily be made at the Hearing, there, without further proceeding being had, the Court may in its discretion make an order to the effect of the decree which would be made at the Hearing, if the cause were regularly prosecuted, upon the summary application of any party to the suit, or of any person directly interested in the suit, although not a party thereto, as a creditor or legatee where the suit is for the administration of assets.

138.—That when all the Answers in a cause are filed, it shall be competent to the Court, if it shall deem it expedient, by interlocutory order, made upon the Motion of any party,

to direct any Inquiry as to the matter of the cause, or any Accounts in the cause, in order that, pending the making of such inquiry, or the taking of such accounts, the plaintiff may proceed in the preparing the cause for hearing; and that, if the Master's report shall be made before the cause shall come on to be heard, it may at the same time be heard upon the subject of the said Report, as well as upon other matters in issue.

139.—That, it being in the power of the Court to order a further argument where it shall appear expedient, no mor e than two counsel shall be heard for each party, in any cause or other matter, unless there be two or more defendants in the same interest, and there each of such defendants shall be at liberty to name one Counsel, and no more; and the present practice of not allowing in the taxation of costs as between party and party, the costs of two Counsel, where both are selected from the Outer bar, shall no longer obtain.

140.—That whenever upon the Hearing of any matter in any suit, or upon any petition, it shall appear to the Court that the case cannot conveniently proceed, by reason that a Solicitor for one of the parties is not present, nor any proper person in his behalf, or by reason that Papers which are necessary for the use of the Court have not been delivered, according to the practice of the Court, there the Solicitor making default, shall personally pay to all or any of the parties such costs as the Court, in its discretion, shall think fit to award.

141.—That the sworn Clerks of the court, and the waiting Clerks, be no longer allowed to claim any fee for attendances in Court, upon any day or days when a cause shall be in the paper for Hearing, or when a cause, appeal, rehearing, further directions, plea, demurrer, or exceptions, shall be in hearing, or in the paper after having been part heard.

142.—That as the taxation of costs by the Masters necessarily occupies a considerable portion of their time which, from the increased duties proposed to be thrown upon them, will be more beneficially employed in other matters, it is expedient that the Masters should from henceforth cease to be the officers for the taxation of costs

except as to the costs of approving and appointing Receivers, Managers, and Consignees and Committees of lunatics' estates, and of passing their respective accounts.

143.—That it is expedient that the Taxation of all other costs should be transferred to the Six Clerks in Chancery, whose time is not fully occupied by their present employment, and who, upon being relieved from all attendance in Court, will be adequate to this discharge of this new duty.

144.—That for the relief of the Six clerks, one of the entering Registrars do at all times attend the Lord Chancellor's court, during its sitting, for the purpose of publicly reading to the court depositions, deeds, documents, and papers, as occasion may require; and that the other entering Registrar do, in like manner attend the Vice Chancellor's court, during its sitting, for the same purpose; and that one of the Secretaries of causes at the Rolls do in like manner, and for the same purposes, attend the court of the Master of the Rolls during its sitting.

145.—That inasmuch as several of the present Six clerks are either far advanced in years, or of infirm health, and may not be equal to the great additional labour which will be thrown upon them by the duty of taxing costs, it appears to be reasonable that they should be permitted to retire from such offices, and the other minor offices which have been constantly held therewith, upon being allowed annual provisions (during the terms of their lives), equivalent to their emoluments, taken on an average of the last three years.

146.—That the Lord High Chancellor, the Master of the Rolls, and the Vice Chancellor, do take into consideration the alterations here proposed, in the offices of the Six Clerks, and entering Registrars, and Secretaries at the Rolls, and do thereupon suggest what shall appear to be reasonable with respect to the future emoluments of these officers.

147.—That the same rule which is now applied in the taxation of Costs, as between *solicitor and client*, be applied also in the taxation of costs as between *party and party*; unless in the case of costs between party and party any of such costs shall appear to have been unnecessarily or unreasonably incurred.

148.—That upon all Orders for payment of Costs, or where a party is entitled to costs, according to the course of the Court, there the party to pay the costs shall, at the same time, also pay the further costs occasioned by the process to enforce the payment of the costs, the amount of such further costs being certified by the Clerk in court of the party to receive the costs.

149.—That where a writ of Execution or a decree or order is duly issued, the party charged by the decree or order shall in all cases, pay the costs of the writ of execution, although it shall not become necessary to issue an attachment to enforce obedience thereto, such costs to be certified by the Clerk in court of the party to receive the same.

150.—That in all cases where an Order *nisi* is made, that a person named do stand committed, unless he do an act specified, there the Costs of such order *nisi* shall be paid by such person, although he does the act in obedience thereto without further order, and whether such person be or not a party to the suit, such costs to be certified by the Clerk in court of the party to receive the same.

151.—That the penal sum in the Bond given as a security to answer Costs, in a suit where the plaintiff is out of the jurisdiction of the court, shall be increased from 40*l.* to 100*l.*

152.—That whenever Costs are ordered to be paid by a person who is not a party to a cause, or where an Order is made in Bankruptcy for the payment of Costs, there the payment of such costs shall be enforced by Subpœna and Attachment, in like manner as the payment of costs is enforced against a party to a cause.

153.—That the deposit upon Exceptions to the Master's report shall be increased from 5*l.* to 10*l.* to be paid to the adverse party, if the exceptions are over-ruled, and in such case the exceptant shall also pay such further sum as the costs occasioned by the exceptions shall amount to upon taxation, unless the Court shall think fit to make other order to the contrary, but in case the exceptant shall in part succeed upon his exceptions, then the deposit shall be dealt with as the Court shall direct.

154.—That the Deposit made upon Appealing from any decree or order of the Court, or upon obtaining a Rehearing of any decree or order of the court, shall be increased from 10*l.* to 20*l.* to be paid to the adverse party when the decree or former order is not varied in any material point, together with such further sum, as the costs occasioned by the appeal or rehearing shall amount to upon taxation, unless the court shall think fit to make other order to the contrary.

155.—That where a person is in prison for disobedience of an order of the Court, directing him to execute some Deed or other instrument, there the Court upon motion or petition, supported by an affidavit that such person upon application duly made to him, after he had been not less than one week in custody, has again refused to obey such order, shall, if it think fit, authorize one of the Masters of the court to execute such deed or other instrument, for and in the name of such person, and the Master so executing the same shall note under the name of the party so signed by him, that such deed or other instrument was executed by him, in pursuance of the authority given to him by the said Order, and a copy of such order shall be indorsed on the said Deed or other instrument, and the execution of the said deed or other instrument by the said Master, shall in all respects have the same force and validity as if the same had been executed by the party himself; and inasmuch as the order of the Court directing the execution of such deed or other instrument, may be appealed from, such deed or other instrument shall, after the same is executed, be impounded with the Master until the further order of the court; and on the day of its execution notice thereof shall be given by the adverse solicitor, to the party in whose name the same is so executed, who, upon application to the court, and payment or tender of the costs of his contempt, shall thereupon be discharged out of custody.

156.—That where a party obstinately retains Possession of Lands, or other real property, after a Writ of Execution of an order for delivery of possession has been duly served, and demand of possession made, and upon an affidavit of such service of the writ of execution, and of such demand made thereunder, and a refusal to comply therewith on the part of the person against whom the writ issued, the party issuing it be at liberty to issue not only the Attachment for breach of such writ, but also the writ of Assistance; and

that the intermediate writ of Injunction further commanding the party to deliver possession, be unnecessary.

157.—That no Counsel do prepare or settle a Bill without written Instructions from the Solicitor; and that the signature of Counsel to a bill be in future considered as a certificate that, assuming the instructions to be correct, it is not unfit that a bill should be filed.

158.—That where the same Solicitor is employed for two or more defendants, and separate Answers are filed, there, upon taxation of such Solicitor's bill, whether between solicitor and client, or between party and party, the Taxing officer shall judge of the propriety of the solicitor's conduct in this respect, and shall allow or disallow accordingly the Costs of such separate answers; and his decision thereupon shall be final.

159.—That in all cases where a person, who is not a party, appears upon any proceeding, whether in a cause or in any other matter, there Service upon the Solicitor in London, by whom he appears, whether such solicitor act as principal or as agent for a solicitor in the country, shall be deemed good service on such party, unless in matter of contempt.

160.—That there be, at least, two clear days between the time of service of the Notice, and the day of hearing of every special Motion; and at least two clear days between the time of service and the day of hearing of every Petition.

161.—That in all cases of Orders *nisi* to confirm Reports, the same shall be served on the clerk in Court without order; and that such orders *nisi* may be obtained upon Petition, as well as by motion.

162. That the Order *nisi* for dissolving the common Injunction may be obtained upon Petition, as well as upon motion; and that such order be served two clear days before the seal.

163.—That, where a plaintiff reads any part of the Answer of the defendant, as evidence, there the defendant shall be entitled to have also read as evidence, any other part of his answer, which explains or qualifies the passage read by the plaintiff, although it be not grammatically con-

nected as a member of the same sentence; but, if such explanation or qualification, whether connected or not as a member of the same sentence, affirms a fact, the defendant shall not have the benefit of such fact, *in evidence*, without proving the same; unless it appear, upon the answer, that, under the circumstances, such fact is not capable of proof; it being understood that this rule does not prejudice the present right of the Court to refer to the whole answer; or the present right of the Defendant, in certain proceedings, to have the whole answer read to the Court.

164.—That the present rule, that the courts of Law cannot, on an action at law, award a Commission for the Examination of Witnesses who are resident abroad, unless the party not seeking the Commission consents to the application, and the necessary consequence that the party desiring such commission is compelled to resort to a court of Equity, in order to obtain it, where the other party does not give his consent—appears to us to occasion delay and expence, which may well be avoided; and that in future, the Judges at Law should be invested with full authority, at their discretion, to award such Commission, at the request of plaintiff or defendant, although the other party do not consent thereto; and that such Commission should no longer be awarded by courts of Equity, unless in cases where the actual purpose of the bill is to obtain a discovery also; and such purpose shall be verified by an affidavit, to be annexed to the bill.

165.—That when and as often as it shall appear expedient to the Lord High Chancellor or Lord Keeper, in respect of the weight and pressure of business depending in the court of Chancery, it shall be lawful for the Lord High Chancellor or Lord Keeper, upon any application duly made for the writ of *Habeas corpus*, to award and grant such writ accordingly, and to make the same returnable before any one of His Majesty's Justices either of the one bench or of the other, or before any one of the Barons of the Exchequer; and the Justice or Baron before whom the said writ is made returnable, shall proceed therein, in the same manner as if the said writ had been awarded or granted by such Justice or Baron.

166.—That the Lord High Chancellor shall select ten or more persons at his discretion out of the fourteen lists of Commissioners of Bankrupt acting in the execution of com-

missions in London, for the purpose of sitting as Commissioners of Appeal from the decisions of all London commissioners; and three of such persons taken by rotation shall sit once in each week, or oftener, if upon experience it shall appear to the Lord Chancellor to be necessary, and at such hours as the Lord Chancellor shall please to appoint.

167.—That all matters which are now the subject of appeal to the Lord Chancellor, from the decisions of the Commissioners acting in the execution of commissions in London, shall in future be first heard by the Commissioners of Appeal, who shall simply affirm or disaffirm the prior decision, without stating particular conclusions, either as to matter of fact, or matter of law.

168.—That the Commissioners of Appeal shall proceed by *viva voce* Examination of witnesses, unless under special circumstances it should appear to them to be expedient to receive testimony by Affidavit.

169.—That the Commissioners of Appeal shall, in all cases brought before them, have a discretion to award such liquidated sum by way of costs to either party, as they shall think reasonable; and the costs so awarded shall be recoverable, in like manner as costs awarded upon a petition in bankruptcy by the Lord Chancellor or Vice Chancellor are recoverable.

170.—That any party dissatisfied with the judgment of the Commissioners of Appeal, shall be at liberty to review the same by petition before the Lord Chancellor, unless the subject of appeal be a matter of property under the value of 150*l.* and such appeal shall be heard and decided by the Lord Chancellor; but no appeal shall be permitted against the judgment of the Commissioners of Appeal upon the subject of costs alone.

171.—That all *viva voce* Evidence, received by the Commissioners of Appeal, shall be accurately taken down in writing, question as well as answer, by a proper officer, to be appointed by them for that purpose; and if either party being dissatisfied with the decision of the Commissioners, shall appeal to the Lord Chancellor, such evidence, together with any affidavits which may have been received by the Commissioners, under special circumstances, shall, upon notice of such appeal from the Secretary of bankrupts, be

returned by the officer of the Commissioners to such Secretary; and the Lord Chancellor, upon the hearing of the appeal, shall decide the same, upon such evidence and affidavits alone, unless he shall think it expedient in any particular case to require further testimony by *viva voce* examination on by affidavit; and where further *viva voce* evidence is required, the Lord Chancellor shall have power to remit the case to the Commissioners of Appeal, for that purpose.

172.—That the Commissioners of Appeal shall, in respect of each appeal which may be brought before them, be paid only such Fees as, by the present practice, they are entitled to receive upon any Public meeting, under a commission.

173.—That no London Commissioner of bankrupt shall be at liberty to act as Counsel for any party, either before the general Commissioners, acting in the execution of a commission, or before the Commissioners of Appeal to be appointed as aforesaid.

174.—That, in order to give more weight and efficiency to the office of Vice Chancellor of England, it would be expedient that so much of the Statute of the 53d year of the late King, chapter 24, as limits the power of the Vice Chancellor to the hearing and determining of such causes, matters and things only, as the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal, shall from time to time direct, should be repealed; and that from henceforth the same independent Jurisdiction should be exercised by the Vice Chancellor as is now exercised by the Master of the Rolls: and that as to all causes, matters and things, which the Vice Chancellor, by the direction of the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal, is now authorized to hear and determine, under the authority of the said Act, except matters of Bankruptcy, every suitor should have the like election, to set down the same for hearing, either before the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal, or before the Vice Chancellor, as such suitors now exercise with respect to the Master of the Rolls; and that all Petitions, except Bankruptcy petitions, which are so set down to be heard before the Vice Chancellor, shall be addressed to him in like manner as all Petitions set down at the Rolls are now addressed to the Master of the Rolls; and that all orders and decrees so to be made by the Vice Chancellor, shall have the like force

and validity as the decrees and orders now made by the Master of the Rolls.

175.—That it would be further expedient that the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, should still have full power and authority to direct, that any cause, matter, or thing which is set down or brought on for hearing before him or them, should, at his or their pleasure, be heard and determined by the Vice Chancellor, but so as not to give authority to the Vice Chancellor to reverse or alter any decree or order made by the Master of the Rolls.

176.—That where an order is pronounced by the Master of the Rolls or Vice Chancellor upon a Motion, or where the Master of the Rolls or the Vice Chancellor decline to make an order upon a motion, no party shall be at liberty to appeal, as at present, from such order, by a motion to be made before the Lord High Chancellor, unless, before notice of such motion be served upon the opposite party, in cases where such motion is made after appearance of such party, the motion paper be countersigned by a Counsel, who shall add thereto a certificate in the following words: "I certify "to the Lord Chancellor that, in my judgment, the appli- "cation of which the above notice is intended to be given "is, with reference to the nature of the matter to which it "relates, fit and proper to be made to the Lord Chancellor." And in cases in which such motion in the nature of appeal is intended to be made, before appearance of any opposing party, and where notice therefore cannot be given, it is expedient for the information of Counsel that it should be declared by a rule or order of the Court, that the Court understands that every such application is made to the Chancellor as being, in the judgment of the Counsel making such application, with reference to the nature of the matter to which it relates, fit and proper to be made to the Lord Chancellor: and upon every such motion in the nature of an appeal, whether made before or after the appearance of the opposite party, the parties shall be confined to the same Evidence which was used or offered to be used before the Master of the Rolls or Vice Chancellor; but any party shall be at liberty to rehear the same motion before the same Judge, either upon the former or new evidence, at his pleasure.

177.—That no Appeal to the Lord High Chancellor from

any decree or order made by the Master of the Rolls or the Vice Chancellor, be permitted, unless the petition for such appeal be presented within six months from the time of such decree or order pronounced.

178.—That the Master of the Rolls or the Vice Chancellor be at liberty to discharge or vary any order, *of course*, made, upon any petition or motion, by the Lord High Chancellor, or by each other respectively.

179.—That no Re-hearing of any cause or matter before the same Judge be granted, unless the petition for the same be presented within one year after the decree or order pronounced.

180.—That in all cases of reference for Scandal or Impertinence, or for the Insufficiency of answers or examinations, where the Master shall certify that it is a fit case for exception to his report, there the party if he takes an Exception accordingly, shall set down the same to be heard, either before the Master of the Rolls or the Vice Chancellor, whose decision thereon shall be final.

181.—That all other decisions of the Master of the Rolls and the Vice Chancellor shall be open to one Appeal only; which, at the election of the appellant, may be either to the Lord High Chancellor or the House of Lords, unless upon the hearing of an Appeal before the Lord High Chancellor, his Lordship shall think fit to suggest the propriety of an Appeal to the House of Lords; but no party is to be at liberty to apply to the Lord Chancellor for such further hearing or appeal.

182.—That all Appeals from the decisions of the Master of the Rolls and the Vice Chancellor to the Lord Chancellor, shall be heard and disposed of upon the same Evidence as was used or read before the Master of the Rolls and Vice Chancellor, and upon no other or additional evidence, unless the Appeal be on account of the rejection or admission of Evidence.

183.—That all Decrees shall contain a precise statement of the particular Evidence read and used, distinguishing therein, from folio to folio, the part of the Answer or Deposition which was read and used; and that it be the duty of

the Registrar to make a note, in his book, of all Evidence which is tendered, whether it be received or rejected.

184.—That, where a party thinks fit to Re-hear any matter before the same Judge, there such party shall not be at liberty to Appeal from the judgment on re-hearing.

185.—That, to avoid the expense of Re-hearing, for the mere purpose of correcting clerical mistakes in decrees, or decretal orders, or errors arising from accidental slips or omissions, it is expedient that such mistakes or errors should at any time before Inrolment, be permitted to be corrected upon Petition.

186.—That every application to stay proceedings, upon any decree or order which is appealed from, be made to the Judge who pronounced the decree or order; and that his decision on such application, be final.

187.—That every application for the new trial of any Issue directed by a Judge of this court, be made in the first instance to the same Judge who directed the issue.

188.—That, upon all questions arising on Demurrers to Evidence, the judgment of the Lord Chancellor, the Master of the Rolls, or the Vice Chancellor, shall be final, and no appeal therefrom or rehearing thereof allowed.

Examined with the Record in the Petty Bag Office in the Court of Chancery, this ninth day March 1826.

J. Bentall.

EXPLANATORY PAPER,

PREPARED BY MR. BEAMES, AND REFERRED TO IN THE REPORT.

Proposition 1.] THE first Process of the Court is the *Subpœna* to compel the appearance and answer of the defendant to the bill of the complainant. Generally speaking, all *Subpœnas* are returnable in term time; but a plaintiff in a town cause, (that is, a cause where the defendant resides in London, or within a certain distance of it,) is by the present practice entitled to a particular privilege, enabling him out of term, upon an allegation, supported by affidavit, that the defendant lives in London, or within ten miles thereof, to obtain an order for a *Subpœna* to appear and answer, returnable, as it is technically expressed, "immediately," which in effect, abbreviates the ordinary return, and relieves the plaintiff from the necessity of waiting until the ensuing term. Adverting to the increased facility of communication which subsists between the various parts of the kingdom, it does not appear reasonable, that any distinction should prevail between town and country causes in this particular respect, but that, in all cases, a plaintiff should be at liberty in vacation to sue out a *Subpœna* to appear and answer, returnable on a day certain, previously to the ensuing term, and this without incurring the useless expense of an order obtained by motion or petition, and on affidavit. It is rather preferable, that this *Subpœna* shall be returnable on a day certain, than "immediately," as it is less calculated to mislead ignorant defendants, and tends to preserve the analogy in the return to the *Subpœna* sued out in term time.

Prop. 2, 3.] When the penal consequences resulting from disobedience to the *Subpœna* are considered, namely, that the person of the party to whom it is addressed may be imprisoned, and his estate taken possession of; and when it is recollected that the *Subpœna* is in itself, in another sense, only a species of notice to the party of what he is required to do, and therefore, contrary to its present technical and obscure form, ought to be clear and intelligible, there is an evident propriety in the suggestion of some of the persons examined, namely, that in order to prevent surprise, every

Subpœna should afford the most explicit information to the party to whom it is directed, of the particular duty which, in obedience to it, is required of him, and the consequences of his neglecting to perform that duty. This will best be effected by a statement in the body of the writ, rather than by a statement in a label to be attached to it, which, possibly, might mislead. Adverting particularly to the *Subpœna* to appear and answer, according to the present practice, if three defendants are inserted in such *Subpœna*, the service is effected by leaving a label, and shewing the body of the *Subpœna* itself to the two first, and by leaving the body of the *Subpœna* at the dwelling-house of the third defendant, or serving him personally with it. (*Ord. Ch. Ed. Beam.* 171.) When, as frequently happens, both or either of the two first defendants cannot be found, to be personally served before the return of the *Subpœna*, the consequences are the delay and expense arising from the necessity of suing out another *Subpœna*. To prevent this delay and expense, a writ of *Subpœna* to appear and answer should be sued out for each defendant, and which, of course, will not require personal service; and the costs of all such writs, which will little exceed the costs of copies (and copies must otherwise be served, in addition to the label, in order to give the necessary information to the defendants), should be costs in the cause.

Prop. 4.] After the defendant has entered his appearance, or, in other words, has come into court, he is allowed a certain time before he is compelled to plead to, or answer the plaintiff's bill. This time differs as the cause is a town or country cause, every cause being, for this purpose, a country cause, where the defendant resides above twenty miles from London. In a town cause he is allowed eight days after his appearance, and in a country cause, he has eight days, and on craving a *dedimus*, further time, viz. until the first day of the next term after the appearance. These periods having elapsed, the defendant, whether in a town or country cause, is allowed in succession, and as matters of course, three orders, for time to plead, answer, or demur, not demurring alone. In a town cause he is allowed by the first order a month, by the second three weeks, and by the third two weeks; and in a country cause he is allowed by the first order six weeks, by the second a month, and by the third three weeks. However true the fact may be, that from the penal consequences which follow an application by a defendant, whether residing in town or

country, for the third order, there are few instances of such application being made, it is not to be concealed that, as much if not greater delay, and unquestionably greater expense, have been the result of those steps which have been taken by defendants to avoid the necessity of being compelled to take the third order for time, and as a substitution for it: and one is, therefore, fully justified in looking at the present practice as actually conceding to the defendant in the whole the periods mentioned, in addition to the time which elapses between the appearance and the first application for time, which is generally wholly lost sight of in computation. Whilst it may reasonably be thought upon the whole, notwithstanding the evidence is contradictory upon this point, that the time allowed by the present practice to a defendant residing in London to enable him to put in his answer, is a period that may safely be abridged in the generality of cases, and that, as represented by one of the witnesses, the unnecessary length of time now given, both in town and country causes, operates very injuriously, by inducing solicitors to neglect collecting materials for the answers, yet it does not follow, regarding the present facilities of communication between the different parts of the kingdom, that it is necessary for the purposes of justice to make so great a distinction between town and country causes, as the present practice has drawn. On the whole, it may be inferred, that in the generality of cases, eight weeks, commencing with the appearance, and not from the time of the first order, would, with due diligence, be sufficient to enable a defendant residing in London to put in his answer, and ten weeks for a defendant residing in the country. If much delay will be obviated and time saved by this alteration, expense may likewise be saved, if these periods are granted without compelling the purchase of them at the expense of the present orders for time, which ought wholly to be got rid of. Whilst the common injunction to stay proceedings at law should not be had for want of answer until eight days after appearance, to prevent its being too easily obtained, and thereby used as an engine of vexation and oppression to defer a legal right, it is conceived that the present period allowed for demurring (however sufficient when originally fixed, and when the bill was of so simple frame that "the "defendant being served with process to answer might, by "advice of counsel, upon sight of the bill only, be enabled "to demur thereunto, if there be cause" (*Ord. Ch. Ed. Beam*, 172.) is, from the increased length and intricacy of bills in modern times, no longer sufficient, and therefore

ought to be extended to fifteen instead of eight days; which may be the more readily recommended, since the additional period, by giving more time to pleaders to reflect upon bills, will, when coupled with the rule hereafter suggested as to the costs of demurrers, necessarily tend to diminish the number of frivolous demurrers, and thus save the time of the court, and prevent both expense and delay in the result.

Prop. 5.] It is one of the provisions of the statute of the *5th Geo. 2. c.* 25, that if any defendant, by virtue of any writ of *habeas corpus*, or other process, shall be brought into court, and shall refuse, or neglect to enter his appearance, or to appoint a clerk in court, or attorney to act on his behalf, the court may appoint a clerk in court, or attorney, to enter an appearance for him; and such proceedings may thereupon be had in the cause, as if such party had actually appeared. If the defendant, having been served with a *subpœna*, and not having entered his appearance, is taken by the Sheriff upon an attachment for not appearing, and committed to prison; and the Sheriff return *cepi corpus*, the practice requires that a *habeas corpus* should issue to bring the defendant to the bar of the court; and if he still remains contumacious, the court will, by virtue of the statute of Geo. 2. direct a clerk in court to enter an appearance for him, (*Walker* v. *Russell*, *14th March*, 1816, *before Lord C. Eldon)* which gives to the plaintiff the full effect of the statute. The expense of bringing the defendant up from the custody of the Sheriff to the bar of the court, is, in some cases, considerable. This may be saved, if the court had the power, upon production of the Sheriff's return, and a certificate of the plaintiff's clerk in court, that the appearance had not been entered, to order one of the clerks in court to enter an appearance for the defendant. There seems no satisfactory reason why the custody of the Sheriff should not, for this purpose, be considered equivalent to the bringing into court, which is the requisition of the statute of the 5th Geo. 2, and the foundation of the jurisdiction; and in compliance with which requisition, the *habeas corpus* has hitherto issued to bring the party to the bar of the court. But, to prevent surprise, fourteen days should elapse from the day the attachment is returnable.

Prop. 6.] If the defendant should not put in his answer within the time allowed by the practice of the court, a long line of process is resorted to for the purpose of compelling him to do it, or of enabling the plaintiff to proceed without

it, and take his bill *pro confesso*. If, upon the attachment the Sheriff should return *non est inventus*, such return is followed by an attachment with proclamations, commission of rebellion, serjeant at arms, and commission of sequestration. If, in the infancy of courts of equity, all the caution which this long series of proceedings implies, could be considered necessary, in order to soften down the objections to the jurisdiction itself, it scarcely can be requisite, at a period when the jurisdiction is fully established, to incumber the suitor with the delay and expense occasioned by these various steps to effect the same object. The intermediate process, namely, the attachment with proclamations and commission of rebellion, might, as it would seem, safely be dispensed with, as they are in a great measure matter of form, though attended with considerable expense and delay, and are sued out for the purpose of grounding the subsequent proceedings. But, adverting to the ulterior result of these proceedings, namely, that they may be the foundation, in the event of an answer not being obtained, of the bill being taken *pro confesso*,—it seems necessary, in order to guard against the defendant being taken by surprise, and to prevent, if possible, the expense of a serjeant at arms, to suggest that no order should be made for the serjeant at arms, unless upon an affidavit of the solicitor or agent, that due diligence has been used for the purpose of ascertaining where the defendant was to be found at the time of issuing the writ of attachment, that he believed that the defendant was to be found in the county into which the writ actually issued, and that due diligence had been used for service of the process, by the officer employed for that purpose. It has been suggested, that an attachment not bailable might be properly substituted for the serjeant at arms, on the ground of the expense attendant upon sending that officer; but this suggestion overlooks the circumstance, that a dread of the expense, may, in this individual instance, operate beneficially upon a defendant otherwise disposed to act contumaciously, and that such a course would be more oppressive than the serjeant at arms, as the defendant must then be sent to gaol: nor does it appear from the returns made to the commissioners, that the serjeant at arms is an officer frequently resorted to; and the necessity of giving effect, if possible, to the previous process, which the rule proposed necessarily imposes upon the plaintiff, will most probably render a recourse to that officer less frequent than it hitherto has been. For these reasons it is not at present deemed expe-

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dient to recommend, that the process which is given effect to by sending a serjeant at arms should be got rid of.

Prop. 7.] If the attachment should be returned *cepi corpus*, and the defendant be in the prison of the King and, the custody of the Sheriff, the practice requires, as already stated, that a *habeas* should be applied for, in order to bring the defendant to the bar of the court. This is followed by his commitment to the Fleet (the prison of the court) and, the successive steps of another *habeas*, an *alias habeas*, a *pluries habeas*, and an *alias pluries habeas* must then be had recourse to before the bill can be taken *pro confesso*. It is difficult to discover the necessity for these five writs of *habeas*. A long succession of processes merely formal can scarcely prevent surprise, but inevitably, must retard the progress of a suit, and add greatly to its expense. The expense occasioned by them, it is apprehended, might very properly be saved; and the only evil which it is necessary to guard against, namely, a surprise on the defendant, might be effectually prevented, by his being served in the prison of the King, with an order, operating as a notice, that the bill will be taken *pro confesso*, within three weeks from the service of such order, unless he puts in his answer; the court at the end of such time having the power, on affidavit of personal service of the order, and certificate of no answer being put in, of directing the bill to be taken *pro confesso*. Whilst it is obvious that the defendant can have no right to complain of a consequence he can so easily obviate, by putting in his answer, the process could scarcely be shortened beyond what has been suggested, without the risk of decrees being obtained by a species of rapidity, working great injustice, and producing endless applications to the court, as a necessary result.

Prop. 8.] If the attachment should be bailed by the Sheriff, and the defendant by the subsequent process committed to the prison of the Fleet, it is apprehended, that the *pluries habeas*, and the *alias pluries habeas* may be dispensed with, as creating an unnecessary expense, and the bill be taken *pro confesso* on the return of the *alias habeas*; but to prevent surprise on the defendant, there should be in all cases, 15 days at the least between the return of the *habeas*, and the return of the *alias habeas*.

Prop. 9.] The defendant having put in his answer, the

plaintiff by Lord *Clarendon*'s orders (*Ord. Ch. Ed. Beam.* 181, 182.) is allowed a certain time to determine whether he will file exceptions to it. Thus, to an answer filed in term time, the plaintiff must file his exceptions according to those orders, the same term, or within eight days after it; and to an answer filed in the vacation, the plaintiff has the remainder of such vacation, and eight days of the ensuing term. These periods the plaintiff is entitled to without any order, and they were probably in Lord *Clarendon*'s day in some measure restrictive upon the plaintiff, as to the time within which he should, if at all, except; but, according to the practice which has since grown up, and now for many years prevailed, the plaintiff is allowed two terms and the vacations (in some cases, the better part of a year) to file exceptions, as it is technicaly expressed, *nunc pro tunc*. It is true, that he must obtain an order, if he would avail himself of this extended period; but the order is granted on being applied for, as a matter of course, and thus only adds to the expense. Probably when the court first relaxed the rule laid down in Lord *Clarendon*'s orders, and granted the extended period, it exercised a discretion on the subject, and was satisfied, that in each particular instance, it ought to give the larger portion of time. It does not appear, when the court first granted this lengthened time, as a matter of course; but the books show that it was granted as such in Lord *Hardwicke*'s day. Conceiving that Lord *Clarendon*'s orders very nearly prescribed the proper rule, it is apprehended, that two months would, at all events, be a sufficient time to file exceptions to the answer, and that the expense of the order to file exceptions *nunc pro tunc*, may altogether be saved, by doing away entirely with it as an order of course. Though there is some discrepancy in the evidence as to the time within which exceptions to an answer should be filed, there seem to be reasons in favour of the period named, it being represented by a gentleman of great practical experience, that at this stage of a cause, the plaintiff's counsel frequently is, and possibly always ought to be, called upon to advise, not merely on the sufficiency of the answer, but on the propriety of amending the bill, and on the evidence necessary to be adduced to support the plaintiff's case, all which may lead to inquiries and discussions, requiring more time than would necessarily be consumed in merely advising on the propriety of filing exceptions; and it might be apprehended, that if a shorter period than two months were given, the court might frequently be occupied, to the delay of more important business, in hearing special

applications for a longer period, which would be discussed at a considerable expence to the suitor. It may, indeed, in this place, once for all be observed, that the same principle has been regarded in a variety of other instances, when there has been occasion to fix the time within which this, or that proceeding should be taken. If in some cases which might be put, less time would have been sufficient than that conceded, yet in the generality of them, less time could not be allowed, without producing injustice, or without, at all events, letting in special applications for further time, at an expense to the individual suitors, and an injury to the public, by the occupying the time of the court in disposing of these purely interlocutory questions.

Prop. 10.] The exceptions having been filed to the defendant's answer, he is allowed by the orders of the court (*Ord. Ch. Ed. Beam.* 181, 182.) eight days to decide, whether he will, or not submit to those exceptions, and put in a better answer; and the plaintiff cannot, unless in an injunction cause, refer the exceptions until the eight days have elapsed. After they have expired, the plaintiff *may*, but he is not compelled to refer them. It is difficult to feel persuaded, that the practice in suffering the plaintiff to rest upon his exceptions after he has filed them, and to refer them, or not, as he chuses, is quite salutary. It is apprehended the converse ought to be the rule, and that it should be compulsory on him to refer them within a certain period, or to abandon them. Probably, six days after the eight have elapsed, would be the proper period within which he should refer them. Whilst this will deter a plaintiff from taking frivolous exceptions, it will relieve the defendant from the expense he is now put to of getting rid of them, and at the same time, be the means of correcting what there may be some reason to believe is, as represented to the Commissioners, sometimes resorted to as an instrument of delay.

Prop. 11.] If the defendant submit to answer the exceptions, he is entitled to two orders, for time to enable him to do it. As the second of these orders leads to a delay, not necessary for the purposes of justice, it may be altogether got rid of; and the expence of the other order, which is granted of course, may be saved, by giving the defendant the time, without requiring him to obtain an order for it.

Prop. 12, 13.] The reasons which induce the Commissioners to recommend, that a plaintiff should be compelled,

within a given time, to refer his exceptions to the original answer, or to abandon them, equally apply to exceptions to a second or third answer. The suggestion of one of the witnesses may usefully be adopted as counteracting delay and expense; namely, that on referring former exceptions back to the Master, the plaintiff should be compelled to point out which of them in particular he considers not to be answered. This will afford the defendant the opportunity of avoiding the expense and delay of a reference, as he may submit, at once to put in an answer to those particular exceptions which his opponent thus alleges are not answered.

Prop. 14.] If upon a second reference of exceptions, the defendant should at once submit to answer without waiting for the report, he should be allowed three weeks in a town cause, and five in a country cause, to put in a better answer. But this time should be given by positive general regulations, and the expense of the order saved; and the rule should apply to a defendant not in contempt.

Prop. 15.] Adverting to those cases where defendants think fit to go before the Master on exceptions, it it obvious that the time which may be requisite to answer the exceptions, can scarcely, in any two instances, be precisely the same, depending upon the cause being a town, or country cause, and upon the means of obtaining information being near, or remote; and depending likewise upon the number and the nature of the exceptions allowed, as in some cases one or two only may be allowed, and those too of a mere verbal nature, requiring from that circumstance, but a short time to answer them; whilst, in other cases, the exceptions allowed may be numerous and intricate. Whilst the discussion of the exceptions before the Master, will necessarily tend to qualify him to decide upon the time which ought to be given the defendant to put in a further answer in each particular case, and will thus make him the most proper judge of it; the inconvenience will be avoided, which would result from fixing one and the same time for cases so totally dissimilar; but to guard against the mischief of the court being employed in disposing of interlocutory applications at a great expense to the individual suitor, the Master's judgment on this point should be final.

Prop. 16.] It appears, that, in Lord *Bacon*'s time, a defendant was allowed to put in four insufficient answers, and it was not until the fourth had been certified insufficient, that he

was to be committed "until he had made a perfect answer, and "to be examined upon interrogatories, touching the points "defective in his answer." (*Ord. Ch. Ed. Beam.* 28.) Lord *Clarendon*'s orders, made about the year 1661, repeat the same rule, (*Ord. Ch. Ed. Beam.* 183.) but the general order of the 30th April 1700, provides, that after a "*third* answer "reported insufficient, every defendant shall be examined "upon interrogatories to the points reported insufficient, "and shall stand committed until such defendant hath per-"fectly answered those interrogatories, and shall not only "pay 4*l.* costs, as heretofore, upon putting in a third an-"swer, but also such further costs as the court shall think "fit to direct." (*Ord. Ch. Ed. Beam.* 317.) This beneficial order, though made in the year 1700, was, it seems, never published, until it appeared in the edition of the general orders of the court, which under the sanction of the present Lord Chancellor, came out in the year 1815. To the circumstance of its never having been published, it is probably owing, that it never has been acted upon, and the practice has been uniformly consistent with the rule laid down in the orders of Lord *Bacon*, and Lord *Clarendon*. There can be no hesitation in recommending, that the order of the 30th of April 1700, should be revived, since the court, in bestowing an indulgence beyond the terms of that order, and in giving effect to the rule as laid down by Lord *Bacon* and Lord *Clarendon*, would be trifling with its own dignity at the expense of that justice which is due to the suitor. The only doubt which can reasonably be entertained is, whether the defendant should not be examined upon interrogatories, and committed after the second answer has been reported insufficient, as suggested by some of the witnesses; but, considering the complicated frame in many instances of the questions to be answered; the possibility of a conscientious defendant, however skilful his draftsmen, of not merely once, but even twice, failing to give so explicit an answer as he really may wish to give; and reflecting upon the difficulty, from the long periods of time which bills in Chancery sometimes cover, of answering all the questions, which an ingenious pleader may put; and, looking at the penal consequences of taking a man from his family and from his concerns, and plunging him into a prison, it may, on the whole, be concluded, that the safe and more salutary rule is, that the defendant should not be compelled to answer *in vinculis*, until after the third answer has been reported insufficient. There may be the less difficulty in thinking this to be the proper line to be drawn, because, when the Masters are required to look

to the materiality, or relevancy of the question, which the defendant is required to answer, it may be presumed, that after a third answer reported insufficient, the defendant is fencing with the justice of the court, and contumaciously withholds that discovery which he can, and ought to give.

Prop. 17.] Supposing the Master to allow any of the exceptions, the practice (unless the defendant be then in contempt) requires the plaintiff to sue out a *Subpœna* against the defendant to compel him to put in a better answer. This is an expense which may be got rid of without the slightest injury to either party, the Master's report of the insufficiency being notice to the defendant, that a further answer is necessary; but, as counteractive of delay, it would be beneficial, that the time to answer exceptions should run from the Master's report, to be dated on the day it is signed, and, where submitted to, from the time of the submission.

Prop. 18.] It has already been intimated, that the plaintiff should be compelled to obtain an order within a given time, to refer his exceptions to the defendant's answer. But he must not be suffered to rest here: the mischief to the defendant is equally great, at whatever period short of the Master's report upon the answer the plaintiff may stop. The plaintiff must prosecute his reference to a completion, and obtain the Master's report. For this purpose he ought to be compelled to obtain the report within a fortnight, a period within the two extremes, unless the Master should think fit to make his report at a future time, certifying, that the additional time taken by him was necessary. To enforce obedience to this rule, the plaintiff must be again urged on by a penalty which must be the result of his neglect: and if he should not obtain the report within the fortnight, the exceptions should be deemed to be abandoned.

Prop. 19, 20.] The defendant having answered, the plaintiff is allowed by the existing practice to amend his bill. The power of amending is extremely beneficial, and a plaintiff could not be deprived of it, without taking from him the means of eliciting that discovery which entitles him in the result to relief at the hands of a court of equity. An honest plaintiff cannot object to a rule which calls upon him to assert this right within a certain time, provided that time be sufficient to enable him with due diligence to be properly advised as to the necessity of availing himself of such right; and a plaintiff who means wrong, can have no sound pre-

tence to object to such a rule, whilst the defendant may rationally ask, that the plaintiff should abide by his case, as he originally stated it, or alter it within a reasonable time. But, the present practice does not *directly* limit the period within which a plaintiff must amend. On the contrary, it expressly allows amendment any time before the bill is open to dismission for want of prosecution, and the general allegation on which the plaintiff founds his application for leave to amend is simply, "that he is advised to amend," on which all the orders are founded, at least all such orders to amend as the plaintiff obtains as of course; and, as will be noticed presently, it permits even after replication, provided there has been no *Subpœna* to rejoin, that the plaintiff should move, as of course, to withdraw his replication and amend. This step may indeed be quite regular, though nearly six terms have elapsed since the answer came in. Should the defendant not drive the plaintiff, by a motion to dismiss, to make the application for liberty to amend, the practice does not require the plaintiff, even at this late period, to amend: he is left to his own time to do it; he is only driven to it to avoid the dismission of his bill. This is a state of the practice, which, for the reasons given, it seems expedient to alter. In the case of one defendant only to a suit, it is apprehended, that after the answer is to be deemed sufficient, the plaintiff, if he mean to proceed by amending his bill, should be compelled to file such amended bill within six weeks, and if he require an answer, he should serve his *Subpœna*, calling for such answer, within one week after filing his amended bill. But if there be more than one defendant, the plaintiff should be allowed six weeks after the last answer is deemed sufficient, to file his amended bill.

Prop. 21.] The expense and delay of serving a *Subpœna* to answer an amended bill on the defendant personally, he being already before the court on the original bill, may be avoided, as service on his clerk in court, his official representative, will effectuate every useful purpose.

Prop. 22.] The orders of Lord *Clarendon* require "that "when the defendants have answered, the plaintiffs and "their counsel are seriously to advise of the answers, and "if they find that upon the answer alone, without further "proof, there be sufficient ground for a final order, or decree "to proceed upon answer without further lengthening of "the cause." (*Ord. Ch. Ed. Beam.* 179.) Though these orders seem to require the plaintiff to use all possible dis-

patch; they do not limit the time within which he should set down his cause on bill and answer; nor does the practice *directly* fix any time within which it is compulsory on him so to set it down. *Indirectly* he is compelled to set it down, if he would avoid a dismission of his bill for want of prosecution. In general cases he cannot, consistently with the orders of the court, set it down until a term after publication hath duly passed, unless by consent and special order. (*Ord. Ch. Ed. Beam.* 318, 333, 335.) It would much tend to correct delay, if the plaintiff, when he intends to have his cause heard on bill and answer, should be compelled to set it down before the expiration of one month after the answers are to be deemed sufficient, and to serve the *Subpœna* to hear judgment within a fortnight after the cause is so set down.

Prop. 23.] The practice in Lord *Bacon*'s time, is thus stated, "If the plaintiff discontinue by prosecution, after all the "defendants have answered, above the space of one whole "term, the cause is to be dismissed of course without any "motion." (*Ord. Ch. Ed. Beam.* 11.) In *Tothill*'s time, the bill was to be dismissed if the plaintiff replied not the second term after the answers came in. The Act of 4 *Ann.* c. 16. *s.* 23, giving full costs to a defendant dismissing the plaintiff's bill for want of prosecution, seems tacitly to have produced a further extension of the time. I say *tacitly*, for it never was done expressly, or by any positive order. From that period to the present, the practice has been, that a bill could not be dismissed for want of prosecution until after the end of the third term after the answer came in. In this, as in some other cases, the practice has silently abrogated a positive written order, and the rule thus introduced, appears to indulge the plaintiff at the expence of the justice due to the defendant, by conceding to the former a period for deliberation considerably beyond what was requisite in any point of view. Independently of the delay, this rule must in some cases have been productive of the greatest injustice to the defendants. I allude to those cases in which the plaintiffs have died before the three terms have elapsed, and their representatives have not chosen to revive the suit. In these instances, the defendants must have lost the whole of their costs, as there is no revivor for costs merely in that stage of the cause. In other respects, the practice connected with the subject of dismission for want of prosecution, is not, perhaps, altogether free from objection. Though the defendant is compelled to wait during the interval of three terms, in some instances nearly twelve-months,

after he has put in his answer, before he can get rid of the suit, he is allowed to do it by a motion of course, which, as it is without notice, may take the plaintiff by surprise, and thus lead to an application to the court to restore the bill, which is a species of application by no means uncommon, is always attended with expense, and not unfrequently consumes much time. A revival of the time fixed by Lord *Bacon*'s order, with a slight extension to meet the more complicated frame of modern pleadings, would probably answer the purposes of justice, and thus sufficiently correct the unnecessary period conceded by the present practice. The defendant should be allowed to move to dismiss at the first seal after the term following the period when the answers are to be deemed sufficient: but to prevent the surprise alluded to, this motion, contrary to Lord *Bacon*'s order, should be on notice to the plaintiff. The result of this motion should invariably be according to the prayer of it, when there is one defendant only, unless the plaintiff shall file his replication and appear upon the motion, and enter into an undertaking, not formal but effective, to speed his cause: such undertaking operating to get rid of the suit, if the plaintiff neglects to comply with the terms of it. Much delay will be got rid of by this undertaking, which imposes the proper penalty upon the plaintiff, if he neglects effectually to prosecute his suit, namely, that he shall pay to the defendant his costs, and that the suit itself shall cease.

Prop. 24.] When there is only one defendant, the foregoing rule ought, as already intimated, to admit of no exception; but as it would be productive of hardship when there are more defendants than one, and the plaintiff has exerted himself to get in their answers, and is, therefore, guilty of no delay, it is conceived, that if the plaintiff is not prepared to file his replication, in consequence of not having obtained a sufficient answer from other defendants, in that case he should be allowed to apply for further time to file his replication when the motion to dismiss is made; and the court, instead of dismissing the bill, should grant such further time to the plaintiff to file his replication, as should be reasonable, provided he can satisfy the court that he has used due diligence to get in a sufficient answer from such other defendants. It is better to fix in terms the only condition on which the court should grant the indulgence, because it will preclude applications on other grounds, which would be the inevitable consequence of leaving it to the discretion of the court generally.

Prop. 25.] Supposing the plaintiff to file his replication, without being driven into that step by a motion to dismiss the bill, as this proceeding will amount to little if he stop here, because it does not put the cause at issue, he should be compelled to rejoin, and obtain an order for a commission, within one week from the filing of the replication, and not be left, as he now is, to exercise his own discretion as to the time of taking these steps. The return of the commission should be limited, regard being had to the period of its issuing, and the parties should be at liberty, without incurring the expence of an order as they are now obliged to do, to execute the commission in term-time. When such commission is returnable on, or before the first return of the following term, the plaintiff should be obliged to give a rule to produce witnesses, and pass publication in that term, and to set down the cause for hearing in the following term; the present practice not permitting the setting down so that it shall be heard in the same term on which publication passes, unless by consent and special order. (*Ord. Ch. Ed. Beam.* 318. 333. 335. 337.) When the commission is returnable on or before the last return of the following term, the plaintiff should give rules to produce witnesses, and pass publication in the next term, and to set down his cause to be heard in the third term; and if the plaintiff should make default in any of these steps, the defendant should be able, as a matter of course, to dismiss the bill with costs. When a succession of acts are to be done by any party to a suit, to advance in effect one single step in the progress of such suit, it becomes absolutely necessary, in order effectually to guard against delay, to specify the precise time within each of such acts should be performed; and when the plaintiff is the party to do those acts, the proper penalty for his disobedience obviously is, that his suit should be at an end, and that he should pay the defendant the costs he has incurred. A plaintiff always ought to be prepared to proceed, it is not for him to say that he is not ready, if sufficient time be conceded him to proceed with effect. When that is given him, the purposes of justice are satisfied.

Prop. 26.] By the present practice, a *Subpœna* to rejoin, returnable on a day in term time, is obtained without an order; but, in that case, the writ must be served on the defendant, in the same manner as the *Subpœna* to appear and answer. To avoid this inconvenience, the usual course is to apply for liberty to sue out a *Subpœna* to rejoin, returnable "'*immediately*," and that service thereof on the

defendant's clerk in court, may be deemed good service on the defendant. The only allegation the plaintiff makes to entitle him to this order is, that " he (the plaintiff) has replied to the defendant's answer." No satisfactory reason can probably be adduced why that, which is always granted as a matter of course, upon an allegation so purely formal, the moment it is applied for, should not be granted without the expense of an order, especially as the general convenience of the suitors would be essentially promoted by allowing the *Subpœna* to rejoin to issue without order, to be returnable immediately, and to be served on the clerk in court.

Prop. 27.] Previously to a certain stage of the cause, a plaintiff is at liberty, as already remarked, to withdraw his replication, and amend on payment of 20*s.* costs. The practice of the court of *Chancery* allows this to be done, as a matter of course, on a mere allegation, " that the plaintiff is advised to amend ;" whilst, on the contrary, the practice of the court of *Exchequer* requires, that the plaintiff should make out a special case to entitle him to do it. It is represented by some of the witnesses, that advantage is sometimes taken of the rule of the court of Chancery, and that the replication is withdrawn to avoid the payment of the costs of suit. Though this may not be of very frequent occurrence, it is prudent to guard against the possibility of it. Independently of this, the policy of a rule, which permits a party of his own accord, and without the attention of the court being expressly called to the subject, to retract, or withdraw from that particular species of proceeding called a replication, is, to say the least of it, of a questionable character. On these grounds, it seems expedient to adopt as a rule, that after replication the plaintiff shall not be permitted to withdraw it, and amend his bill, without special order obtained upon a notice of motion, stating the matter of the proposed amendment. This will preserve in the hands of the court a salutary control over the conduct of the plaintiff, and prevent his rendering the practice of the court an instrument of vexation ; and it is the more necessary, as delay in this stage of the cause may, by the event of the plaintiff's death, wholly deprive the defendant of his costs, as has already been remarked.

Prop. 28, 33, 34.] Bills are frequently filed by trustees, assignees of bankrupts, personal representatives, and by other persons uninformed to a certain extent of the real facts; and the answers to these bills, will often disclose circumstances

which render it absolutely necessary, that such bills should be amended, either to elicit a further discovery, or to put other matters in issue, or to vary the case upon the record, and adapt it to the truth. In these cases, it is obvious the purposes of justice would be defeated, if amendment were not permitted; and, as has already been intimated, the power of amending is extremely beneficial, and could not be taken away without depriving the plaintiff of the means of eliciting that discovery which entitles him to relief in equity. But at present, as there is no restriction upon the number of times the bill may be amended, as the plaintiff is at liberty to amend as of course, as the costs, when the plaintiff pays costs for amending (and which he does not in every instance), are not equivalent to the expense the defendant is put to, there may be reason, in point of fact, for the representations made to the Commissioners, that the power of amending bills is sometimes abused, either with a view to postpone the payment of the costs of suit, or with a view to vexation. It may, however, be doubted, whether amendments of bills for the mere purpose of vexation are very numerous, unless possibly in causes where the common injunction, in other words, the injunction to stay legal proceedings is sought; and the court has the power, if amendments are made for the purpose of vexation, of punishing such conduct with costs, of which there are several instances, and some very recent in the books. Various suggestions have been submitted to the Commissioners, having for their object, the preventing abuse in amending bills. Thus, it has been proposed, that the costs of amendment should in the first instance be paid by the plaintiff; that the plaintiff, although he obtain a decree with costs, should pay the costs of unnecessary amendments; that the plaintiff should pay the costs of amending in all cases, unless the necessity of amendment arise out of the defendant's answer; that amendments should be restricted to newly discovered matter; that the plaintiff should, in the first instance, be required to verify his bill; that no amendment should be allowed without an affidavit, that the matter to be introduced was unknown when the bill was filed, or had been rendered necessary to be inserted in the bill, by the frame of the defendant's answer, or had originally been rejected by the counsel who drew the bill. Whilst some of these suggestions have a tendency to render the power of amendment almost nugatory, others incline to consider it purely as an indulgence to the plaintiff, rather than as belonging to him *ex debito justiciæ*, consistently with the peculiar nature of a court of equity, which works out the relief

it affords the suitor, by sifting the conscience of his adversary, which is sometimes the only depositary of the evidence. Without being prepared wholly to take from the plaintiff the power of amending his bill, or to put him under restrictions, that would prevent him from availing himself of it, though it nominally remained, one may be permitted to question the policy which would, in this particular instance, shorten the arm of the court, or paralyse its power. Probably the purposes of justice would be answered, if the plaintiff, before replication, should be allowed to amend once, as of course; and to guard against amendments for delay or vexation, that no further order to amend should be obtained by the plaintiff, unless in cases of mere formal amendment, until the draft of the intended amended bill had been settled by counsel, and signed by him in testimony of his approbation. A further guard against amendments for delay or vexation would be, that the plaintiff and his solicitor, or the latter, if the plaintiff be abroad, or under incapacity, should make an affidavit, that such draft of the bill has been so settled and signed by counsel, and that the amendment is not intended for the purpose of delay, or vexation, but because it is considered to be material to the plaintiff's case. In addition to these checks, the taxing officer should, in all cases, where the plaintiff is directed to pay to the defendant the costs of the suit, allow the defendant the costs of every amendment of the bill, unless such officer should be of opinion, that the amendment was rendered necessary by the default of the defendant, deducting from such costs the several sums paid by the plaintiff, at the time of amending according to the course of the court; and that where the taxing officer refuses to allow a plaintiff, who has obtained a decree with costs, the costs of any amendment, thinking such amendment to be unnecessary, then such officer should tax the defendant's costs, occasioned by such amendment, and deduct the amount from the costs to be paid by the defendant to the plaintiff.

Prop. 29.] THE common order to amend, which the plaintiff, as already observed, now obtains as of course, does not limit the time within which the amendment shall be made. The obvious consequence is, that the plaintiff, if delay be his object, may avail himself of the form of the order, and not proceed to amend, and the bill cannot be dismissed whilst the order remains in force, although it is not acted upon. The defendant has no means of compelling the plaintiff to make use of the order to amend, or to abandon it;

but by applying specially to the court for another order, that the plaintiff may be directed to amend within a given time, or that the order to amend shall be discharged. To prevent the delay arising out of this state of the practice, and the expense of two orders, when one may be framed so as to answer every useful purpose, every order to amend the bill should contain an undertaking on the part of the plaintiff to amend, and, if he require an answer, to serve the *Subpœna* to answer within three weeks from the date of such order; and if the plaintiff should make default, the order to amend should be void, especially with respect to the defendant's right to dismiss the bill for want of prosecution, which should not thereby be prejudiced in any respect.

Prop. 30.] If the plaintiff require an answer to the amended bill, the defendant is entitled to two orders for time to make his defence. (*Ord. Ch. Ed. Beam.* 455.) The expense of these two orders may altogether be got rid of, and the time they concede be lessened. The defendant, without being put to the necessity of obtaining any order, should be entitled in a town cause to five weeks, and in a country cause to six weeks, to plead, answer, or demur; but he should not in either case be allowed to demur alone after fifteen days from the time of his appearance; and whether in a town or country cause, if he do not plead, answer, or demur to the amended bill within eight days, the plaintiff should be entitled, as of course, to the common injunction.

Prop. 31.] Although the plaintiff may require no answer to his amended bill, it may be absolutely necessary for the defendant to answer it, in order to put in issue matter of defence to the amendment, or to contradict, or explain it. He ought to be allowed ten days for this purpose, from the time of filing the amended bill.

Prop. 32.] As the suitors cannot have such ready access to their counsel in the intervals which elapse between the last seal after Trinity term and the first seal before Michaelmas term, and between the last seal after Michaelmas, and the first seal before Hilary, and as access to their counsel is absolutely necessary to enable them to do the acts after mentioned, these intervals should not be reckoned in the computation of time which is allowed a party to move to vary minutes, or to move to stay proceedings under an order, or decree, or which is allowed a defendant to answer, plead, or demur to an original, or an amended bill, or to answer

exceptions, nor in the computation of time which is allowed a plaintiff to amend his bill, or to file exceptions to a defendant's answer, and possibly in some other similar cases.

Prop. 35, 36.] THE costs of allowing or over-ruling a plea or demurrer, have been for a long period fixed costs. They were originally 3*l.* 6*s.* 8*d.* and were afterwards extended to 5*l.*; the court, by its order of 1794, declaring, that the parties should be liable to such further costs, as it should think fit to award. (*Ord. Ch. Ed. Beam.* 173, 329, 456). In this instance, the policy of fixing the costs may be questionable, but at all events, the sum of 5*l.* is not in the generality of cases by any means adequate to the costs incurred; and the rule which imposes it upon the successful party to apply for the costs he has really incurred beyond the sum of 5*l.* inverts the general principle, according to which the costs should follow the event, and the successful party (as a matter of course) should have his whole costs, leaving it to the unsuccessful party to show, if he could, a reason to exempt himself from the operation of the general principle. For these reasons, and for the purpose of preventing speculative and frivolous bills, pleas, and demurrers, which the present rule is strongly calculated to promote, it is conceived, that upon the allowance of a plea, or demurrer, the costs should no longer be fixed costs, but the plaintiff should pay to the defendant the taxed costs, as between party and party. If such plea, or demurrer be to the whole bill, then, as the suit is virtually out of court, unless the plaintiff by replying to the plea, puts the defendant to the proof of the facts of it, the plaintiff should also pay the defendant the further taxed costs of the suit, (of which he is now wholly deprived by the allowance of the demurrer, as they are not comprised in the costs of the demurrer) unless the court shall order the contrary, or unless the plaintiff shall undertake to reply to the plea, in which particular case the costs should be reserved, unless the court should otherwise order. Upon a parity of reasoning, when the plea, or demurrer is over-ruled, the defendant ought to pay the plaintiff the taxed costs of such plea, or demurrer, unless the court should think fit to direct the contrary.

Prop. 37.] THE Commissioners have recommended, that the plaintiff, though he succeeds in obtaining the costs of the suit, should allow the defendant the costs occasioned by unnecessary amendments of the bill. This recommendation proceeded on the principle of conceding to the plaintiff a

full measure of justice, but not permitting him to make the practice of the court an instrument of vexation. On the other hand, the defendant must not be allowed with impunity to fence with the rules of the court, and thus increase the expense at which the plaintiff is to obtain justice. On these grounds, it would seem proper, that when the plaintiff obtains a decree with costs, he should also recover the taxed costs occasioned by the insufficiency of the defendant's answer, or answers, after deducting such sums as have been paid by the defendant in the first instance, according to the course of the court on his answering exceptions.

Prop. 38.] ACCORDING to the existing practice, all writs, forming part of the process of contempt, may in town causes be made returnable *immediately* in vacation, an order, which is of course, being first obtained for such purpose. It is conceived, that the expense of this order may very properly be saved. All writs forming part of the process of contempt in country causes, can only be made returnable in term time. It would obviously conduce to get rid of delay, if such writs were returnable in vacation; and no injury has suggested itself as likely to result from such a rule, if all surprise be guarded against by requiring, that there should be fifteen days between the *teste*, and the return of each writ. It is apprehended, that the costs to be paid by a person guilty of a contempt should be all such as he actually puts his adversary to. Whilst such a rule would operate as a salutary check, by adding to the penal consequences of contempts, it will relieve the innocent party from an expense which is now thrown upon him by the default of his opponent.

Prop. 39.] IF a defendant is in contempt for want of an answer, and then files his answer, he is entitled to an order to be discharged out of custody, upon payment, or, tender of the costs of contempt, (*Ord. Ch. Ed. Beam.* 200), but if the plaintiff accept those costs, he cannot, should the answer eventually prove insufficient, resume the process where it left off, but must begin it *de novo*. This seems to be contrary to the terms of the order of 1676, which provides, that, in case any former process of contempt shall have issued against such defendants, for want of appearing, or, answering, the plaintiff may resort back to such process of contempt and proceed thereupon, &c, notwithstanding the costs of such former process were paid upon the coming in of such insufficient, or, frivolous answer. (*Ord. Ch. Ed. Beam.* 249). As it must occasion delay to an innocent party to compel him to

begin the process *de novo*, and the circumstance of his accepting those costs, which the rule of the court gives him, is any thing but a satisfactory reason, why he should be actually punished, by being put to the inconvenience of commencing his process again, it seems expedient to revive the order of 1676, and that the plaintiff should resume the process where he left off, in case he has occasion again to resort to it, in consequence of the answer proving insufficient.

Prop. 40.] FROM the evidence given by the examiners, it appears, that much of their time is lost in consequence of witnesses not attending at the particular periods appointed for their examination; and, though this arises from many causes, the most prominent seems to be, that the attendance of the witnesses in most instances is voluntary, it not being usual to serve them with *Subpœnas*, and this under an apprehension, that the witnesses would, if served, not speak out so effectually on the behalf of the parties who called on them to give testimony. No mode of preventing this loss of time to the office, and its consequent delay to the suitor, occurs, which appears so little open to objection, as that of requiring the *Subpœna* in all cases to be served; whilst, as is now the case, it is unusual to serve it, a witness may naturally feel irritated at receiving this compulsory species of summons, conceiving himself to be offensively singled out; but the cause of irritation ceases when the same rule is observed towards all witnesses of every degree; and the observance of such a rule, whilst it will effectually, in most instances, prevent the loss of time, which the office now sustains, will remove an imputation from which the testimony itself as now obtained is, perhaps, not wholly free, as it ought not to be more or less explicit, more or less strong, in consequence of the more or less courtesy observed towards the witnesses in bringing them before the examiner. To ensure the strict observance of the rule now proposed, the examiner should never proceed to examine any witness, unless at the time of his examination he produce the *Subpœna*, or, otherwise satisfy the examiner, that such *Subpœna* has been duly served. Of course this cannot apply to the solicitor.

Prop. 41.] BY the general orders, "no witness shall be "examined in court by the examiner, without the privity of "the adverse party, or of his clerk, who deals for the ad-"verse party, to whom the person to be examined shall be "showed." (*Ord. Ch. Ed. Beam.* 185, 262.) In practice,

the witness is taken to the Six Clerks Office, to the seat of the clerk in court of the other party, to be shown to such clerk in court. The object of this production seems to have been to enable the clerk in court to identify the witness, and to take steps in order to have him cross-examined, if necessary; but as those ends are sufficiently attained by the other part of the same rule, requiring a note in writing to be left at the clerk in court's seat, of the name, residence, and description of the witness, and as the solicitor of the adverse party may always attend at the Examiner's Office, (according to the evidence of one of the examiners), and see the witness, if he desires it, and thereby identify him,—the production of such witness at the seat of the clerk in court, which leads to some delay and expense, may be dispensed with, and that without any injury whatever to the suitor.

Prop. 42.] SOME delay is the consequence of the rule, that persons to be examined as witnesses by the examiners, are first to be taken by that officer before a Master to be sworn; and it would not appear that any particular benefit arises from this course, nor that any injury would result from altering it. It is expedient, therefore, that the examiners should have the power to administer the oath to all witnesses produced before them, as fully and effectually as the same is now administered by the Masters of the court.

Prop. 43.] IN carrying into effect the authority delegated by the Act of the 50th year of the reign of his late Ma- "jesty, it was considered necessary that witnesses on different "sides of the same cause might, so far as the same was "practicable, be examined by different examiners," and with this view it was directed, that "all interrogatories "for the cross-examination of any witnesses, should be "delivered to the examiner who did not examine such wit- "ness in chief, and he should examine the said witness "thereupon." (*Ord. Ch. Ed. Beam.* 476, 478.) This regulation, which is not confined to the court of Chancery in England, but equally prevails in the court of Chancery in Ireland, possibly contemplated a bias on the examiner's mind in favour of the party for whom he examined in chief, which would prevent him from discharging his duty faithfully to the other party. But, as it has been observed by one of the examiners, "the examiner is sworn to act impartially, "and being wholly disinterested in the success of either "party, he may surely be trusted with observing his oath

" in the one case as well as in the other;" and as much time is lost and expense incurred by the existing rule, in consequence of the examiner who is called upon to cross-examine, being obliged to postpone the commencing of such cross-examination until other examinations which he may have in hand are finished, whereby " the witness must remain in " town all the time, or leave it and return again at the ex- " pense of a second journey," it seems expedient to alter the existing practice, and allow the same examiner to cross-examine as well as examine the same witness.

Prop. 44.] At present the depositions of witnesses are taken in the third person, but that it would be beneficial that such depositions should be taken down in the first person, instead of the third, appears from the reasons stated " by one of the examiners. " By the change of person (he " observes) the length, and consequently the expense of " the deposition would be materially diminished. Instead " of the words, *and this deponent further saith, that he,* " which begin nearly every sentence in a deposition, would " be substituted the simple pronoun *I,* and the commis- " sioners will recollect that parties pay for every word (that is " for every folio containing a number of words). But besides " this saving, the examiner would be materially facilitated " in taking the deposition by the use of the first person, and " would be able to follow much nearer than he can at pre- " sent, the witnesses own language. The deposition too, " would carry much more the life and spirit of a *viva voce* " examination, and be relieved in a great measure from the " stiffness and artificial appearance with which the third " person invests it. It would also, I am persuaded, be more " intelligible to a great number of the witnesses who are apt " to confound the distinction of persons, when speaking of " *him the said defendant, him this deponent,* &c., and indeed " with some of the subjects who appear before him, the exa- " miner is obliged to commence by explaining to the wit- " ness, and desiring him to carry in his recollection, that he " is the deponent." Independently of these reasons, which are conclusive in support of the proposed alteration, it appears, that the diminution which will thereby be effected in the length of depositions, will be about one-sixth.

Prop. 45.] Amongst the objections which have been made to the form of the interrogatories exhibited for the examination of witnesses, not the least prominent is that which applies to the last interrogatory, requiring the witness to

state any thing *which may be of benefit, or advantage to the party on whose behalf he is examined*; and the two examiners concur, in representing, that, conceiving these words most emphatical, they would not suffer a witness to state in his answer, any thing, however material to the matter in issue, unless the witness represented, in the exercise of his own discretion, that he considered it beneficial to the party for whom he was called to give evidence. In this view of the matter, the result might be most incompatible with the purposes of justice, if this were the only interrogatory on which the witness were examined; as he might know that which would be totally destructive of the whole case of the party who called him, but which would not come out upon this interrogatory. But although it be perfectly true, that this particular mischief would in many instances be corrected by the previous examination the witness had gone through on the other interrogatories, in answering which he ought to, and probably would state all he knew on each particular point, without regarding whether it was beneficial, or prejudicial to the party who called him; and although it may be questioned, whether the examiners have not put rather too narrow a construction on the language of the last interrogatory, taken in connection with their duty in acting upon it, it cannot be denied, that it is highly expedient to remove the imputation of partiality, and the possible result of it in particular instances, by giving the last interrogatory a more general form, and inserting, instead of the more objectionable passage, the words, *material to the subject of this examination*, which will, unquestionably, let in evidence, that is material to the matter in issue, whether beneficial, or not, to the party examining; in other words, will let in the whole, and not merely a part of the truth.

Prop. 46.] It appears from the evidence of the examiners, that each examiner has one sworn clerk only, and that the business of the office is not unfrequently delayed, in consequence of there not being a sufficient number of sworn clerks. This inconvenience has been attempted to be remedied by the employment of a writer, who, as he is not authorized by the court, is not sworn. This mode of remedying the inconvenience cannot but be objectionable. The manner also in which this person is remunerated, is very peculiar. "This clerk, or writer, is maintained," (observes one of the examiners) "partly at the expense of the sworn clerk, and "partly by the optional contributions of solicitors, who have "to reimburse the sworn clerk the additional expense he

" incurs by the maintenance of his clerk in the office, on " account of the expedition thus obtained in getting out their " copies. I also add a small annual gratuity to this clerk, " or writer." On the whole, it seems expedient, that a second sworn clerk should be attached to the office of each of the examiners, and that a proper remuneration should be allowed him.

Prop. 47, 48, 49, 50, 51, 52.] ASSUMING that it is not expedient to change the mode now used, of taking evidence upon written interrogatories, and that at present it is not prudent to make any other alterations with regard to the Examiner's Office, than those suggested, one is naturally led to advert to the manner in which commissions to examine witnesses are executed in the country. It is not improbable, that the evils attendant upon the execution of these commissions, are in some measure exaggerated. A few strong cases certainly cannot be a fair sample of the whole; but when it is considered that the persons chosen for commissioners are selected by the parties themselves, and may, therefore, have some bias in favour of those selecting them,—when it is also considered that these persons, from their residence in the country, from the limited experience they consequently must have, and from their only being occasionally called upon to attend to this particular species of business, can be but indifferently qualified for the difficult duty they are required to discharge,—when also it is recollected that large sums are expended in these examinations, and that the length of the depositions is much increased by their containing what is not evidence,—it seems expedient to alter the practice, and that the Chancellor should appoint certain persons to execute these commissions within a given distance, (not infringing on the examiner's right to execute all commissions within 20 miles of London), and, in case of such persons being engaged, the commissioners should be selected from lists of persons resident in the country, and to be nominated by the Lord Chancellor. Some minor provisions are necessary to give full effect to these regulations, limiting the amount of fees, and substituting an allowance for expenses, and otherwise decreasing the aggregate costs.

Prop. 53.] LORD *Clarendon's* orders provide, " that " after witnesses examined in court, there should be two " rules only given for publication, *viz.* an ordinary rule, and " then a rule to shew cause why publication should not pass;

"and, upon the return of a commission, one rule only to be "given: within which times aforesaid, if the other side do "not shew unto the court good cause to the contrary, publi- "cation shall pass accordingly." (*Ord. Ch. Ed. Beam.* 190.) The order of 1701 speaks of it, as a grievance, the "great expense to the suitors of this court, by motion and "otherwise, for enlarging the time of publication, after the "cause hath been set down to be heard," (*Ord. Ch. Ed. Beam.* 190.), and attempts to correct it. But the practice has, subsequently to these orders, undergone considerable alteration. The party who wishes to enlarge publication is allowed, as of course, to do it, if it does not interfere with the hearing of the cause. Under this restriction, it cannot produce delay; but it is quite the contrary as to expense. Publication is now enlarged from time to time, and in each instance at an expense productive of no adequate benefit. It is true, this enables the party to postpone the trouble of getting his evidence together, but that obviously ought not to be encouraged. The remedy for the mischief seems to be, that publication should not be enlarged, except upon a special application, supported by affidavit, and at the expense of the party making it, unless otherwise directed by the court.

Prop. 54.] In a suit for establishing a will, the heir at law is, by the long-established practice of the court, entitled to an issue *devisavit vel non;* but he cannot be compelled to decide, whether he will, or not, require such issue, until the hearing of the cause, when he will have had an opportunity of considering the evidence taken in the cause, and of satisfying his mind, so far as that evidence extends, whether he should, or not, have the matter investigated by the *viva voce* examination of the witnesses on the trial of an issue. If he should elect to have such an issue, as all the expense incurred in examining the witnesses, would, in the event of their being in existence at the time of the issue being tried, be wholly useless, and the evidence they had given in equity might, possibly, be made an improper use of by the heir when he came to try the issue, and, at all events, that evidence might not, improbably, in some measure affect that testimony which the witnesses might give on such trial, it seems expedient to provide, that, in all such suits for the establishment of wills, neither party shall before the hearing enter into any evidence, either to support, or question the will, except that the plaintiff shall examine the attesting witnesses upon the usual in-

terrogatories, and which apply only to the formal execution of the will, and the heir may cross-examine such witnesses.

Prop. 55.] THE *Subpœna*, to hear judgment, is in effect a mere notice that the cause will be heard on a given day, (*Ord. Ch. Ed. Beam.* 170); but by the practice of the court, it is to be served personally, or left at the house of the party with one of the family, a certain time before the hearing, it being an ancient rule of the court, that "no decree bindeth "any person who was not served with process *ad audiendum* "*judicium*, according to the course of the court, or did appear "in person in court." (*Ord. Ch. Ed. Beam.* 7). But this mode of service is sometimes dispensed with by an express order. This is not a very modern practice. The reports of Lord *Hardwicke's* time represent, that orders for service "are "pretty much discretionary." (2 *Ves. sen.* 23). Every beneficial purpose would be answered by a general rule directing the service in all cases to be upon the clerk in court: litigious persons might, indeed, possibly complain that they had not received notice, but if their legal agents or professional representatives have notice, they ought to be bound by it. The court itself appears to have recognized this principle in a remarkable instance, when it held, that in the case of an infant defendant the *Subpœna* to hear judgment must be served on his guardian. 2 *P. Wms.* 643. *Taylor* v. *Attwood.*

Prop. 56.] IT occasionally happens, that the paper of the day contains several causes which have been either compromised or abated, or which have been disposed of in another branch of the court, it being permitted by the practice, that a party should set down his cause at the same time before the Master of the Rolls and Chancellor, thereby taking the chance of a hearing before the Judge who may first come to it. But as a certain number only of causes are inserted in the paper of each day, the causes thus compromised, abated, or disposed of, when they get into the paper, have the effect of excluding others which are ripe for hearing; and when the other causes in the daily paper are of a mere formal nature, the consequence is, that the paper is disposed of in an early part of the day, and the remainder of the day is lost to the suitors of the court. To prevent this inconvenience, it should be incumbent on the solicitor of the plaintiff to cause an entry to be made in the cause-book kept in the Registrar's Office, of the fact of the cause being compromised, abated, or disposed of; and to induce him not

to omit making such entry, he should be allowed a fee for the duty, provided the entry be made in due time.

Prop. 57.] It sometimes happens, through the inadvertence, or omission of the plaintiff, that the cause is not in a fit state to be heard when it is called on, but it goes out of the paper, and it becomes necessary to set it down a second time, and to serve new *Subpœnas* to hear judgment. As the defendant is in no default, he ought to have the costs occasioned by the first setting down, and calling on of the cause, although he should not in the result obtain the general costs of the suit.

Prop. 58.] It will sometimes occur, that a cause which is called on is not decided, but it does not go out of the paper, being adjourned only, upon payment by the plaintiff to the defendants of the costs of the day, which differ as the cause is before the Lord Chancellor, and Vice Chancellor, or Master of the Rolls: thus, before the Lord Chancellor and Vice Chancellor they are 5*l.*; but before the Master of the Rolls only 3*l.* 6*s.* 8*d.* As the defendant is put to precisely the same expense when the cause is before the Master of the Rolls as he is when it is before the Lord Chancellor or Vice Chancellor, there seems no satisfactory reason for the difference which now exists in the costs of the day; and as the sum allowed for those costs is divisible amongst all the defendants, however numerous, it is conceived such sums should be increased to 10*l.* whether the cause is before the Lord Chancellor, the Master of the Rolls, or the Vice Chancellor, giving the court a discretion to decrease the amount if it should think proper. One of the witnesses has suggested, that the sum allowed for the costs of the day, instead of being as at present, divided amongst all the defendants, should be paid to each adverse solicitor, thus multiplying the sum to be paid. But if such a rule were adopted, the costs to be received would in many instances exceed the costs actually incurred by the defendant; at all events it would visit the plaintiff too harshly, and beyond what the purposes of justice require.

Prop. 59.] Although, for the reasons which are stated in another part of this paper, it does not seem expedient to shorten the form of decrees, and to direct that such form should merely contain the title of the cause, and the mandatory part of the decree, yet, as a copy of a decree, or order, containing thus much, and no more, may in many instances

be all that a party wants to enable him to appear in court, or go before the Master, and the present practice would not allow him to confine himself to a copy of a part merely, but would oblige him to incur the unnecessary expense of taking a copy of the whole decree or order, it seems requisite to provide, that any person should be at liberty to take a copy of the title and ordering part only of any degree or order, paying for the same after the present rate of payment.

Prop. 60.] ADVERTING to the registrar's office, it appears from the evidence that much of the time of the deputy registrars is necessarily occupied in court, and that the drawing up and passing of the decrees and orders are thereby unavoidably delayed, to the great injury of the suitors in general. Previously to the creation of the office of Vice Chancellor, each of the Judges of the court had two deputy registrars attached to his branch of the court; and, although it would have seemed the necessary consequence of the appointment of an additional Judge, upon whom a large portion of important business would be devolved, that some additional deputy registrars should have been attached to his branch of the court, yet, it does not appear to have been then thought expedient to make any new officers of that description. The consequence was, not merely that a very considerable quantity of additional business was thrown upon the two deputy registrars of the Lord Chancellor, inasmuch as they became the deputy registrars of the Lord Chancellor and Vice Chancellor, and had, therefore, to draw up and pass all the orders and decrees made by both of those Judges, instead of those made by the Lord Chancellor only; but a serious impediment was placed in the way of dispatching those orders and decrees, by the necessity imposed upon these individual deputy registrars; namely, that both of them should attend in court, when the Lord Chancellor and Vice Chancellor were sitting at the same time, which left the office without any deputy registrar of that department, an event that tended much to delay business, and that obviously never did, or could occur before the creation of the office of Vice Chancellor. Under these circumstances, there can be no hesitation in concurring in the representation of the witnesses, that two additional deputy registrars, each having two clerks, are absolutely requisite to the due discharge of the additional business devolved upon the office, by the appointment of a Vice Chancellor; and, it is obvious, that the suitor will be essentially benefited by this arrangement, which will not merely enable the deputy registrars to give greater

dispatch to the drawing and passing of orders and decrees, but will allow them more time to dispose of questions arising between conflicting solicitors, as to the minutes actually pronounced, a duty of great importance, and which necessarily occupies much of their time, and which their attendance in court, coupled with their present limited number, prevents their discharging so expeditiously, as the justice due to the suitors requires. Some benefit also may be anticipated to arise to the suitor, from the additional time which the deputy registrars will thus have to bestow upon the framing of orders and decrees; and, in some instances, this may lead to forms, of a more condensed description, and confined, as far, at least, as recitals are in question, within the terms of Lord *Hardwicke's* order to "the substance and scope only of the "pleadings tending to the points in controversy, upon which "the decree is founded, and be made in the most concise "manner, and not to contain any recitals immaterial to the "points in question," (*Ord. Ch. Ed. Beam.* 381). Beyond this, it seems scarcely safe to recommend, that decrees should be shortened, especially so as to contain only the mandatory part and title of the cause. Though the evidence upon the subject is contradictory, there is an evident utility in the form of decrees, which the court has from very early times adopted; and that form, in some measure, flows out of the nature of the jurisdiction, requiring the substance and scope of the pleadings to be stated, as comprising the facts of the case put in issue by the parties on which the court interposes. Besides, this form may beneficially be referred to by the Judge and the counsel in the subsequent stages of the same cause, and whilst it affords valuable information, when referred to as a precedent in other causes, the length does not appear materially to add to the delay; and the benefits more than compensate any additional expense occasioned by the length.

Prop. 61, 62.] ALTHOUGH no complaints have been made with respect to the fitness of any of the four gentlemen now occupying the office of deputy registrars, yet representations have been made in regard to the mode in which persons are originally introduced into the registrar's office as clerks, and trained for the situation of deputy registrars. It appears, that they are employed in the office, in copying and framing orders and decrees, and they remain as clerks until passing through the intermediate situation of entering registrars, whose chief duties are discharged by deputy, they succeed, as a matter of course, by rotation, supposing them

not to be disqualified by any decided incompetency, to the office of deputy registrars. As they generally remain many years in the situation of clerks, receiving certain fees and salaries, originally small, though periodically increasing, and they may continue as clerks, during the greater parts of their lives, they usually enter the office in early life, when they are mere youths; as such, they have undergone no preparation for the office; and although it might be difficult to draw any inference to be depended upon, from an examination of persons of their age, yet they are not submitted to any examination as to their real or probable ability, or fitness to prepare themselves in the result, for the very important office they may ultimately be called upon to fill. This, it must be conceded, is any but a fit mode of education for a most important public office. The present deputy registrars appear to be fully sensible of it. Whether the clerks should succeed in rotation, may be a question. If they are so to succeed, it is conceived there ought to be great caution both in the selection and training of them. But this subject may most properly be left in the hands of the Judges of the court, should no virtual change in the constitution of the office itself be deemed expedient.

Prop. 63.] APPLICATIONS are frequently made to the court, to vary the minutes of decrees or orders, considerable periods having intervened since such decrees or orders were pronounced. The mischiefs arising from these applications are well described in the order of the 9th of August 1721. The Chancellor of that day "taking notice that petitions to him preferred on pretence of rectifying minutes, are often found frivolous, and rather designed to vary the judgment of the court, or to introduce new matter not before mentioned or insisted upon, which cannot be regularly done but by rehearing, and observing that such petitions are usually not presented within a reasonable time, but delayed until the matter may be thought out of memory, whereby the court is put to much trouble, and the suitors to great expense." (*Ord Ch. Ed. Beam,* 325.) To correct these evils, the order of 1721 directed the application to be made within six days after the order pronounced, which period seems to have been an extension of the order of the 6th of April 1687, (*Ord. Ch. Ed. Beam.* 270.) By the subsequent order of the 5th of June 1725, (*Ord. Ch. Ed. Beam.* 334, 337,) the court allows a week after the order pronounced for applications to vary the minutes, confining such applications in terms, to cases "when any party shall

" conceive a mistake to be in the minutes," which are the precise words of the order of the 9th of July 1725, adopting the same period of a week. Independently of the weight due to these old orders, which unfortunately have been tacitly abrogated by a contrary practice, all the persons examined upon this subject unite in opinion, that the time for varying the minutes should be limited. Concurring in this opinion, it is apprehended that the principle of these old orders should be revived, and that no application to vary minutes should be allowed, unless made within three weeks after the decree, or order has been pronounced, which whilst it must necessarily have the effect of repressing improper applications, will the better enable the court to deal with the applications themselves when made. But the subject should not be dismissed without adverting to a custom stated in the order of the 6th of April 1687, which probably ought, as far as it possibly can, to be revived, since suitors are put to great expense, and the court itself occupied with endless reconsiderations of questions between the parties, from the loose manner in which matters are discussed, and the omission to bring before the court all the points, and the neglect to have them taken down by the registrar, evils which cannot altogether be repressed, although they may in some degree be checked, by limiting the period within which applications to vary minutes shall be made. " Whereas for the preventing of differences " that did arise upon decrees and orders pronounced in open " court, the right honourable the Lord High Chancellor, &c. " hath from time to time caused all minutes to be read in " open court, that the counsel at the bar, and other persons " concerned, might take notice of what did concern their re- " spective clients, and speak for the rectifying thereof, or " adding thereto, as occasion offered, whilst the matters were " fresh in the memory of the court; and hath several times " given directions that afterwards none should presume " either to petition or move the court, complaining against " any order agreeing with the minutes, except the minutes " should, after the reading thereof, be altered, or the regis- " trar shal fail in the doing of his duty pursuant thereto. " Without due regard thereto, several petitions have been " since causelessly preferred, his Lordship doth, therefore, this " day order, that due observation be given by the parties " concerned when any minutes are read in court, to the end " that no further complaints may be made against the officer, " or the minutes by him taken in court, except as aforesaid." (*Ord. Ch. Ed. Beam.* 270.)

Prop. 64.] THERE is an express provision of the court, requiring all petitions for "*Subpœna*, attachment or other process," and the orders thereupon, to be filed with the registrar, (*Ord. Ch. Ed. Beam*, 114), "to the end the suitor may know, whither to resort to see the warrant for such "process and proceedings." But when the importance, not merely to the individual suitors, but to the public in general, of preserving a faithful record of the different proceedings which could be accessible on all occasions, be considered, this provision instead of being as it is confined to petitions for *Subpœnas*, attachments or other process, requires to be extended to all petitions to the court (not meaning thereby bankrupt or lunatic petitions), and to cases stated for the opinion of a court of law, and such petitions, as also such cases after the Judges have certified their opinion thereon, shall be filed in the report office before the order of the court is acted upon.

Prop. 96.] IF there be any thing scandalous or impertinent contained in any pleading, or proceeding, as this, by adding to its length, unnecessarily increases the costs, the party aggrieved, as the mode of disposing of the question, is entitled to refer it to the Master, and obtain his opinion upon the subject. These references are obtained as of course, and there may be reason to believe, that they have in some instances been had recourse to, with a view to the solicitor's own particular benefit, in the shape of costs, rather than with a serious intention of conferring any good on the party in whose name they are taken, as the costs to the party aggrieved of expunging the matter complained of, often exceed the costs occasioned such party by the insertion of the scandalous and impertinent matter. Nor is the form in which these references are taken altogether unobjectionable. It is general, and without specifying the particular passages objected to as scandalous or impertinent. This, obviously, precludes the party whose pleading or proceeding is alleged to be scandalous or impertinent, from exercising any judgment on the subject, much less from submitting to have the objectionable passages expunged. Nor is the result in respect to costs, in all cases precisely that which justice requires. If 500 passages are before the Master pointed out in succession as scandalous, or impertinent, and the Master should deem 499 to be neither the one nor the other, but should consider the remaining passage to be open to the objection taken, this will carry the costs, though substantially the re-

ference has failed. These mischiefs would be obviated, by requiring such references to be obtained only on written exceptions, pointing out distinctly the passages complained of, which the other party may then submit to have expunged; and such exceptions should be signed by counsel, whose signature will be a check upon improper references. In addition to which, the party taking the exceptions should be compelled to obtain the Master's report on them within a fortnight, unless the Master shall think fit to make his report on a future day, certifying the further time he has taken to have been necessary. The costs of impertinence merely, though not of scandal, as likewise the costs of matter submitted to be expunged, should be in the discretion of the Master, which is preferrable as a general rule to that suggested by one of the witnesses, of making the costs dependant on the number of folios expunged. But the party whose pleading or proceeding is objected to, should be allowed to submit to have the matter complained of expunged, and thus avoid further delay and expense, as it is to be feared that references of this description are sometimes had recourse to, in injunction causes, more with a view to delay than any other object. In proceedings which occur in the Master's office, it may materially tend to save both time and expense, that the Master should *ex officio* have the power of expunging impertinence, and of giving or withholding the costs of any matter which he should so expunge.

Prop. 100.] The decisions of the courts of law upon interlocutory proceedings cannot be carried by appeal to the House of Lords. This rule applies a very wholesome limit to litigation, but, unfortunately, it does not prevail in the court of Chancery. The practice in this respect, and its consequent evils, are well stated in the following extract from the Report of the Lords' Committee, ordered to be printed on the 17th of June 1823. "It has been also stated, that "there is a course of appeal from court to court in Chan- "cery, and from the Chancery to the House of Lords, which, "without injury to the suitors, might be suffered no longer "to exist. The following instance may exemplify what is "meant, and, at the same time, show, what might be an "useful change in the practice. When a defendant is called "upon to answer a bill, his answer is sometimes referred to "a Master, as insufficient, or as impertinent, or as scan- "dalous; the reference directing the Master to report, whether "the answer is open to the objections. If the party is dis- "satisfied with the Master's report, he excepts to it. The

" exceptions, often very many in number, are heard before " the Master of the Rolls, or Vice Chancellor. If, upon that " hearing, the report is confirmed, the party may appeal to " the Chancellor. If the Chancellor again confirm the re- " port, the party may appeal to the House of Lords. This " last appeal, it is represented, is seldom resorted to; but, " that the hearing before the Master of the Rolls, or Vice " Chancellor, is frequently resorted to, and also the appeal " from them to the Chancellor; and that, in hearing such " exceptions upon appeal, much time is occasionally em- " ployed." To counteract these mischiefs, the obvious remedy appears to be, that the Master's report upon all references for scandal and impertinence, and upon all references for the insufficiency of answers, or examinations, should be final, and no exceptions should be allowed to be taken to it, unless the Master himself shall certify, that it is a fit case for exception, which will leave an opening for cases of nicety and importance; and it is to be hoped, that the Master will not, from any mistaken notion of liberality, or from a diffidence in his own judgment, give his certificate to any other case. To enable the Judges of the Court to discharge the numerous and difficult duties imposed by their offices upon them, the public interest imperiously demands, that their time should be economized, and not consumed upon matters of trivial import, which not unfrequently involve as much discussion as those of great intrinsic weight. If this cannot be effected by repressing the spirit of litigation, it may, by imposing limits beyond which it should not be suffered to go, and, obviously, it must stop at some point. To allow it to proceed one single step beyond that which justice absolutely requires, is an evil of the greatest magnitude. In this, as in many other instances, it is, perhaps, not possible to correct an existing evil, by the suggestion of any plan to which some objection may not plausibly be raised; but, supposing it to be a choice of evils, the possibility of justice being sometimes sacrificed, by rendering the Master's judgment final upon matters of scandal, impertinence, and insufficiency, is a mischief of a very trivial nature, when compared to that endless succession of appeals upon interlocutory matters, which, whilst it gratifies a litigious spirit, enables the wealthy suitor to harass and wear down his less opulent adversary—employs the time of the court in discussing matters scarcely compatible with its dignity—degrades the Judges of it, by having their decisions upon trivial matters questioned before another tribunal—and, finally, overburthens all the tribunals of justice, from the Master to the House of

Lords, with business. It may safely be predicted, that these references for scandal, impertinence, and insufficiency, will be less frequent when the Master's judgment upon them is final, and when all possibility of using them as a powerful instrument of delay, by carrying them through the successive stages of appeal to the House of Lords, is cut off; especially if the Master be empowered *ex officio* to tax the costs of scandal, impertinence, or insufficiency, and to expunge the scandalous or impertinent matter found such by him, or, by submission in writing, admitted to be of that description.

Prop. 101.] ADVERTING to exceptions to answers for insufficiency, there is, it seems, a difference of opinion amongst the Masters, producing a totally opposite result in their decisions. Some of them think themselves bound *not* to regard the relevancy, or materiality of the interrogatory, and, if they find it not answered, they allow the exception; whilst others, pursuing the contrary course, disallow the exception, if they do not perceive the relevancy, or materiality of the interrogatory. Probably this difference of opinion may have arisen from the rule which has been supposed to exist, that a defendant, if he do not plead, or demur, must, unless in certain excepted cases, answer fully all the questions put by the bill, coupled possibly with the notion that it would be dangerous for the Master to take upon himself, in this stage of the cause, to attempt to distinguish between what is, and what is not material; but, if the Master's decision be disputed, the court itself, in precisely the same stage of the cause, must dispose of the matter; and the court would dispose of it, by adverting to the materiality. This alone would be decisive, that the Master should look at the materiality, as nothing can be more dangerous, or tend more both to delay and expense, than for the Master not to regard the principle of decision, which will inevitably be acted upon by the court. When the Master's judgment upon exceptions for insufficiency is to be final, it is an additional reason, why, in disposing of exceptions, all the Masters should adhere to one and the same rule; and it is apprehended, such rule should be that which the court itself, in trying the Master's judgment, will pursue, if there be, with the Master's sanction, an appeal from that judgment.

Prop. 104.] THERE may be reason to think, that mischief sometimes results from the same solicitor being concerned for different parties in the same cause, when such parties have conflicting interests. The most honourable man, placed

in such a situation, may find it difficult to get the better of a certain bias, which may sway him more to one side than the other, and induce him, unknown to himself, to sacrifice the interest of one of the parties to that of the other. The first impression, therefore, would be to lay down the general rule, that no solicitor should be employed for persons filling adverse characters in the same suit; but the evidence is in this respect directly in opposition to such rule. Persons whose practical experience entitle their opinions to great weight have a decided conviction, founded upon all they have seen during the course of their professional lives, that any such general rule would be highly prejudicial, and they represent the practice of the same solicitor being concerned for all, or the greater number of the parties, when confined to amicable and family suits, though the parties have conflicting interests, as one attended with no inconvenience whatever, but, on the contrary, as rather a benefit to the parties interested. They conceive also, that such general rule, if laid down, would be evaded by the names of different solicitors being covertly used for the other parties, when, in reality, only one solicitor was concerned for all, or at least the greater part of them. On the whole, though it is impossible to approve of a practice which allows the same solicitor to represent parties having conflicting interests in the same suits, and it would be better that persons connected with the administration of justice, should cautiously avoid even the most remote imputation of error, it is rather too much, in direct opposition to the great weight of evidence, to lay it down as a general rule, that the same solicitor should not in any instance be concerned for different parties in the same cause, when they have conflicting interests. It should however, be provided, that the solicitor employed for the plaintiff in a creditor's suit, should not in any case, nor should his partner, or clerk in any case, be employed for any defendant; and that neither a solicitor employed for any party in a cause, nor his partner, or clerk, should be employed for the receiver, or any person who purchases property under a decree of the court in the cause, or any person who, not being a party, is in any other manner incidentally connected with the cause. Considerable mischief has in some instances been the result of suffering the same solicitor to be concerned for the plaintiff in a creditor's suit, and for the executor or administrator of the deceased. The suit has either remained for years stationary, unless an impulse has been given to it by the institution of another effective suit against the representative, or the fund has never been brought

into court, and has been ultimately lost to the creditors. Not that this state of things is wholly without a remedy, according to the existing practice, because, if a decree have been made in a suit, the court, upon the application of another creditor, can give him the conduct of the cause; and if no decree have been made, any other creditor might himself institute a suit against the personal representative. But, it is better, if possible, to prevent the evil altogether, since in many instances creditors would prefer sitting down under the loss of their individual debts, rather than embarking in litigation, by adopting an existing, or instituting a new, suit. In addition, a further corrective of the mischief is provided by a power given to the Masters, enabling them to require, that any party shall be represented by a distinct solicitor.

Prop. 105.] THOUGH it has not been deemed expedient, for the reasons already stated, by any general rule to prevent the same solicitor being in any case concerned for different parties in the same suit, but the restriction has been confined to a particular class of causes, it may be proper to arm the Master with a discretionary authority, enabling him, upon any proceeding before him, where the same solicitor is employed for two, or more parties, to require that any of such parties should be represented by a distinct solicitor. To enforce obedience to this requisition, the Master should be allowed to refuse to proceed, until such party is so represented.

Prop. 120.] THE present practice permits the suitors to set down their causes on further directions to come on to be heard, either before the Master of the Rolls, or the Vice Chancellor, totally disregarding the fact, that the cause has been originally heard by a different judge, than the one before whom it is thus set down to come on upon further directions. There is reason to apprehend, that an improper use has been sometimes made of this power of selecting the Judge who shall hear the cause upon further directions, and that the cause has been set down on further directions before a different Judge, than the one who originally heard it, with a view of obtaining a different decree, than as it was conjectured would have been pronounced, if it had come on before the same Judge: and in other instances, where no such object has been in view, the effect in practice has been injurious to the suitor, who has been put to additional expense and delay by the different views of two different Judges, the

latter, probably, not altogether agreeing with the former, yet not having the power of altering the decree, but on the contrary, having the duty imposed upon him of obeying it, and if possible of carrying it into effect, although embarrassed by the declarations originally made, or the collateral inquiries originally directed. In this dilemma, recourse has been sometimes had to directing other inquiries, which must necessarily have been the occasion of additional expense, when, possibly, had the further directions come on to be heard before the same Judge who pronounced the original decree, he might have explained his own views and matured his decree, without further expense or delay to the parties. Besides which, it seems to be merely an act of justice to the Judge who pronounces the original decree, that he should be allowed to mature or complete it. It seems therefore necessary to provide, that all causes originally heard by the Master of the Rolls, or the Vice Chancellor, should be heard on further directions by the same Judge. This, however, should not preclude such causes being heard before the Lord Chancellor.

Prop. 121.] By the present practice, a day is inserted in orders, directing the payment of money, or the transfer of stock. If the order is not complied with by the day so appointed, it becomes necessary to obtain a new order, thereby occasioning additional expense, which it will be prudent to obviate, by providing, that in future no day shall be named in such order, but that it shall be general, and the party to make the payment or transfer shall have secured to him such time as the court may think reasonable for that purpose, restraining the party who obtains the order from serving a writ of execution after that time.

Prop. 122.] According to the existing practice, the Accountant General does not proceed to execute an order of the court, directing him to lay out money in the purchase of stock or exchequer bills, or to re-invest dividends received by him, unless the solicitor by a written request applies to him to execute such order. For making this request the solicitor is entitled to a fee. It certainly would scarcely be worth the change, if the solicitor's fee were all that could be saved by an alteration in this part of the practice; but when it is in evidence, that considerable loss has been sustained by the suitors, in consequence of the Accountant General not being requested to execute, and, therefore, not having executed these orders, it seems ex-

pedient to provide that he should, in all instances, obey the order, without awaiting the requisition of the solicitor. The same observation applies to exchequer bills purchased by the Accountant General, or deposited with him; when these become payable, he should receive the amount due, and re-invest the same in the purchase of other exchequer bills, without waiting for the solicitor's request. If any circumstance should intervene after the order has been pronounced, and before it is executed by the Accountant General, which should render it injurious to the parties to have such order executed, it is open to them to apply to the court to restrain the execution of it. It cannot be thought either consistent with justice, or compatible with the dignity of the court, that the execution of an order pronounced by it, directing one of its officers to perform an act, is to depend upon the pleasure, or caprice of any of the other officers of the court; nor, on the other hand, should any power but that invested in the court itself, stop the progress of an order, when once it has been pronounced.

Prop. 123.] The Legacy Act, (*the* 36*th Geo.* 3, *c.* 52, *s.* 32,) speaking of cases "where, by reason of the infancy, or absence beyond the seas" of any person entitled to any legacy, &c., chargeable with duty, by virtue of that Act, the personal representative cannot pay such legacy, although he "may have effects for such purpose,"—allows him to pay the same into the bank, giving the court of Chancery, on petition or motion, the jurisdiction to direct it to be paid out of court to the person entitled to it. The principle of this Act, which in effect disposes of the question connected with the particular legacy in a case of admitted assets, without the delay or expense of a suit, may beneficially be extended to a case, where, supposing sufficient assets to be admitted, the resistance to the payment of a legacy arises wholly from a doubt as to the construction of a gift in the will. The expense and delay of a formal suit for the determination of a mere question of construction, would, in this instance, be unnecessary, and the legatee, or the personal representative may be allowed to apply by petition, without bill, for an immediate judgment upon the point. The court should be empowered to make such order as the case might require, as well with respect to the payment of the legacy as to the costs of the proceeding; but such order should be open to the same rules, with respect to its being questioned on re-hearing or appeal, as if made in a cause. Although this power

should be conceded to the court, it should be discretionary in the court to proceed by petition, or by bill.

Prop. 124.] DOUBTS have been suggested by some of the persons examined, whether, upon a bill filed by any party interested, or by an executor or trustee, for the construction of any instrument, or for the direction of the court on any matter of trust, it is in the discretion of the court to confine its decree to the particular relief prayed by the bill. These doubts have, probably, arisen from confounding the habit of the court with its power; and, because the habit of the court more usually is not so to confine itself without wholly administering the fund, or entirely executing the trusts, it has been inferred, that the court cannot, consistently with its principles, do otherwise, or confine its decree to particular relief short of wholly administering the fund, or performing the trusts. So far from concurring in this conclusion, it is apprehended, that the court has a discretion, if it thinks fit, to confine its decree to the particular relief prayed; but it must obviously be left in each instance to the court to decide, whether it will, or not so confine it. It is unnecessary in this place, to express any opinion upon the expediency of so confining it in any class of cases.

Prop. 125.] MUCH evidence has been taken upon the subject of the Rules relating to Pleas, and the result may be stated to be, that those rules are so highly technical, and so difficult in their practical application, as to be productive, in some instances, of great injustice. Some of the most experienced of the persons examined, have had no hesitation in avowing it as their opinion, that no plea, that is, no plea standing alone, and unaccompanied by an answer, could be framed to meet some bills, in consequence of the artful manner in which they may be drawn; and that, therefore, all the mischief arising from setting out by answer a long and intricate series of transactions and accounts, extending over a period of many years, must be submitted to, the rule having been, as we have already observed, probably without sufficient examination assumed to be, that if the discovery sought cannot (unless in some excepted cases) be barred either by demurrer, or by plea, such discovery must be given, however extended, unless the record requiring it can be cleared of it, through the medium of a reference for impertinence. But, when the record seeking the discovery stands untouched, it has been considered, that such a discovery must, unless in the ex-

cepted cases, be given, if there be no demurrer or plea put into the bill, which covers such discovery. Great contrariety of decision, arising from the difficulty of coming to a satisfactory conclusion, has, at different times, existed on the point, whether, *generally*, a defendant could protect himself from answering to the discovery, by raising the question by an answer. From the language of Lord *Clarendon*'s orders it appears, that the court formerly, when the matter was brought before it on exception, exercised the right of dispensing with a positive answer, as to facts immediately within the defendant's own knowledge. "An answer to a "matter charged as a defendant's own fact, must regularly "be, without saying to *his remembrance*, or, *as he believeth*, "if it be laid to be done within seven years before, *unless the "court, upon exception taken, shall find special cause to dis-"pense with so positive an answer.*" (*Ord. Ch. Ed. Beam.* 179.) This shows, that the court would then exercise a discretion on the subject. But the question is, whether rules of form, framed for the purpose of promoting the ends of justice, should be suffered to prevail, and defeat those ends? Whether the technical rule, that an answer to support a plea, if it give any part of that discovery which the plea covers, should over-rule the plea, and entitle the plaintiff to the whole discovery; in other words, whether the answer by giving more discovery than the plaintiff is entitled to, should get rid of that bar, however substantial in itself, which the plea brings forward in opposition to the discovery? Whether, indeed, rules of this description should be suffered to operate, and give to the plaintiff a discovery, oppressive beyond measure to the defendant, and ruinous to him in point of expense, which the plaintiff, in the result, may not have the slightest possible pretence to call for? Two modes of correcting the mischiefs flowing out of the existing doctrines, have been suggested. The one, to give to the rules relating to the pleas, when accompanied by answers, a more liberal character: the other, to allow a defendant to insist by answer on the same matter as he could by plea in bar to the discovery; the evil to be cured, applying not to a plea simply, but to a plea and answer. The first of these propositions is accompanied with considerable difficulty in its execution, and would, probably, be attended with the consequence of introducing much inconsistency into the subject, the extent of the mischiefs flowing out of which, it is not easy to foresee, and it would not be easy to guard against. The second of these propositions, though by no means free from difficulties, whilst it receives some countenance from the order

of Lord *Clarendon*, is but an extension of the rule which has been recognized in those cases already alluded to as the excepted cases, and it gets rid in some measure, of those technical rules which embarrass the question when it is looked at as arising upon a plea; nor can any injury which he has a right to complain of arise to the plaintiff, if care be taken that such an answer be treated as a plea, with respect to its being speedily heard, and with respect to its bearing on the subsequent stages of the cause. In those cases, where, by the existing practice of the court, the defendant could, by demurrer, protect himself from discovery, he should likewise be enabled to protect himself by answer. It must, however, after all, be confessed, that this particular proposition is open to very serious questions, and may possibly, in practice, be found to be surrounded with insuperable difficulties.

Prop. 126.] MANY persons have been examined upon the subject of that peculiar process of the court, which issues rather for the prevention than the remedy of an injury, termed an Injunction, and the persons alluded to have thrown much indiscriminate censure on this process, without very accurately distinguishing between the special injunction, founded on a case brought distinctly before the view of the court, and supported by oath, and having for its object the prevention of some immediate and irremediable injury, and the common injunction, which issues as a matter of course in given events, without the attention of the court being called to the subject, and without any corroboration by oath of the facts of the case, as put in issue by the pleadings, and which has for its object the staying of proceedings at law. That it frequently works injustice; that it is often applied for with a view to delay; that it is founded on a case in some degree fabricated for the occasion;—are alleged as a few objections to the injunction, and in some measure these objections are founded on reason, when applied to the common injunction. They apply, however, in a less degree to the special injunction. The special injunction, indeed, is founded on the merits of the case, as far as it is disclosed to the court; the common injunction rests on a supposed default of the defendant, who, as he might avoid it by putting his case on the record within the period allowed by the rules of the court, is restrained by it from proceeding at law, until he does so put his case on the record. If sufficient time be allowed the defendant so to place his case on the record, he is not injured, provided he is not improperly delayed, or, in other words, provided his opponent apply to a court of equity

for the injunction at the earliest period consistently with justice, and at the same time avoiding unnecessary expense. If it be true, that the earliest period would be, if he be the defendant at law, the moment he was sued at law, it must be recollected, that the ground of his application (unless where he seeks discovery in aid of his legal defence) is, that he cannot substantiate his defence at law, that in order to ascertain such to be the fact, he must have recourse to legal advice; that by such advice he may be led to conclude that he has a good legal defence, and that he may not be undeceived until a verdict has been pronounced in favour of his opponent. To compel him to file a bill for an injunction antecedently to the period when he is led to believe that it is absolutely necessary, and if he omitted it, to shut him out from it altogether, must obviously tend, in a variety of instances, to impose much unnecessary expense on the suitor: yet as a legal right is (unless where the party wants discovery to aid him at law) to be restrained, on the ground of a permanent equitable right, the party who would restrain it, ought to come the first moment he hears that the assistance of a court of equity is necessary. He should, therefore, by affidavit, pledge himself to the fact, that his bill is not filed for delay, but for the purposes of obtaining equitable relief, or of obtaining a discovery to aid him at law; and, he should specify the time when he was first advised of his equitable title, and the solicitor should state the period, when he was first advised of such equitable title. If the plaintiff should, by unavoidable circumstances, be prevented from making this affidavit, the solicitor's affidavit should not be dispensed with; on the contrary, he should strengthen, by adding to it, a statement of the circumstances, by which the plaintiff is prevented making the affidavit. To place the remedy conceded by the common injunction under these restrictions, will, it is presumed, materially tend to correct the mischiefs alleged, and until these restrictions have been tried, and found not to answer, the prudence of adding to them, may be fairly questioned. To require all the facts alleged in the bill, to be verified by affidavit, is, to say the least of it, a proposition of too doubtful policy to be adopted in the first instance; and, the evidence shows the difficulties which surround it, and the objection to its adoption, unless the mind is prepared at once to go the length of repudiating altogether the jurisdiction enforced by the common injunction: and, here it should be recollected, that there may be no legal defence to a right which may be matured by an action, although there may be an unanswerable equitable defence to

it, an equitable defence which a court of law, however, cannot give the party the benefit of. Nor, is it to be forgotten, that if a party is allowed thus unconscientiously to avail himself immediately of his legal right,and his opponent has no remedy, but to await a decree to be restored (assuming there is such a remedy, which, perhaps, is not quite so clear) the remedy in many cases would come too late, and would be rendered wholly nugatory, by the intervening alteration of circumstances, such, for example, as the insolvency of the party called upon to restore the fund he had possessed himself of, who, though legally in the right, might, consistently with the doctrines of a court of equity, be altogether in the wrong. Nor, is it to be omitted, that the process of the common injunction has existed much beyond the period of two centuries, and is recognized as the familiar practice of the court in Lord *Bacon*'s orders, (*Ord. Ch. Ed. Beam.* 13, 14.) and in *Tothill*'s practice (*Proceed.* 35, 36.)

Prop. 127, 128, 129.] BILLS are sometimes filed by personal representatives, and sometimes against them, with the professed object of administering the assets of a deceased person. When a bill of this kind is of an amicable, or collusive nature, it frequently happens that the suit is depending for years, during which it remains undecided, should no creditor, by having recourse to an action at law, or by instituting another suit in equity, give an impulse to it, and drive it forward to a hearing. The pendency of such a suit will often deter other creditors from taking any proceeding at law, or commencing any suit in equity, as they are averse to incur useless expense, and are naturally led to await a decree, under which they can receive rateably with others. If, in this expectation no other suit is commenced, nor any action brought, the assets may, and unfortunately often do, remain in the executors' hands unadministered, and may eventually be lost. This is the state of things previously to a decree, as has already been observed in another place; but when that has been pronounced, as it is in the nature of a judgment for all creditors, the court will allow any of such creditors to prosecute the suit, should the party on the record neglect to do it. The mischief therefore to be cured, applies to such causes in a state previously to a decree: to remedy the mischief, it seems expedient, that whenever an executor or administrator files a bill for the administration of assets, he should annex a schedule of his receipts and payments, and of the balance in his hands, and a statement of the outstanding property, and of the debts due to the estate, and he

should verify the same by affidavit, to be annexed to the bill; and a similar schedule should be annexed to the answer of the personal representative, where he is defendant to a suit for the administration of assets; and no such bill, or answer should be filed unless these directions are complied with; and in order to enable the six clerk to act in that respect, the clerk in court should make an indorsement on every such bill and answer, to the effect that it was a bill, or an answer to a bill for the administration of assets. This, taken in connection with the other regulations, will put the creditors and legatees into possession of the actual state of the assets; and the court, being also in possession of the state of the assets, should have the power of making such order as it may deem expedient for the security of the balance in the hands of the personal representative, and of the outstanding property of the deceased, upon the summary application of any party to the suit, or of any creditor or other person interested in the assets to be administered, although not a party to the suit. But as the present rules of practice do not sufficiently concede, unless to a party on the record, the means of inspecting such record, it will be necessary, in order to enable creditors and other persons who are not plaintiffs or defendants, to avail themselves in its full extent of the benefit of these regulations, to allow any person who is a creditor, or interested in the administration of the assets, or his agent, to read the bill or answer, having first by affidavit shewn himself to be such creditor or so interested, or such agent; but he should pay a moderate fee for this inspection, which, whilst it will remunerate the officer, will tend, in connection with the affidavit, to check improper curiosity. By the present practice a person must take a copy of the whole bill, or answer, which would, in many instances, be an unnecessary expense to persons who merely wanted the schedule, or some other particular part, for the purpose of sustaining an application, that the personal representatives should pay a balance, or that a receiver of the outstanding estate should be appointed. It is, therefore, but just, that the creditor, or other person so inspecting the record, should be allowed to call for an office copy of such detached parts of the bill, or answer, as he may stand in need of, without taking a copy of the whole bill, or answer.

Prop. 130.] PREVIOUSLY to a decree for the administration of personal assets, the representative is not (by analogy to the confession of a judgment at law) precluded from giving any creditor preference over other creditors of the same de-

gree, (see *Maltby* v. *Russell*, 2 *Sim. & Stu.* 227,) by payment in full of such creditor's demand, though the effect may be, that all the other creditors of the same degree may be thereby partially, if not wholly deprived of their debts. It is obvious, that this rule is open to great practical abuse, and may eventually totally defeat that equality amongst creditors of the same degree, which it is the professed object of a court of equity to reach in decrees for the administration of the personal assets, and thus the interference of the court may be rendered wholly useless. To counteract this evil, the rule itself should be so far restrained in its operation, that if, after the filing of a bill by a personal representative for the administration of ssets, or after a *Subpœna* served on such personal representative when he is defendant to such a bill, he should make any payment to any creditor, which should operate to the prejudice of any other creditor of equal degree, then to the extent in which such payment should so prejudice any other creditor of equal degree, the same should be disallowed by the Master in taking the accounts.

Prop. 131, 132.] WHEN a decree has been pronounced for the administration of the personal estate, as this is in the nature of a judgment for all creditors, (*Paxton* v. *Douglas*, 8 *Vesey*, 520), but cannot be pleaded at law; the court will not suffer any creditor to proceed at law against the personal representative, but will restrain the creditor from prosecuting any action against such representative, provided, according to a very beneficial rule, the latter bring into court the amount of the estate in his hands, and which amount he is required to verify by affidavit. As the foregoing propositions afford every creditor ample means of knowing the precise amount of the assets in the hands of the representative, and of applying to the court to take those assets out of his hands, it seems but even-handed justice that the representative should, before a decree be allowed to restrain a creditor from proceeding against him at law, especially if he will, by affidavit, state the whole amount of the assets in his hands, and submit to pay the same into court, and to an immediate decree for an account, should the court think fit to direct it. This, in effect, will place all the creditors in the same situation as that in which they now stand; but if the personal representative should not avail himself of the means of protection which this proposition concedes him, and should suffer a creditor to proceed to judgment and execution, he should not be allowed, on passing his accounts, the costs of such proceedings at law, nor the amount of such execution, to the

prejudice of other creditors of equal degree with the creditor who has so proceeded at law.

Prop. 133.] THERE is reason to apprehend, that the winding up of a cause is sometimes delayed, when the assets are more than sufficient, to the great injury of creditors whose debts do not carry interest, with a view to the individual advantage of the persons entitled to the residue, who, when such residue produces interest, as they are entitled to such interest, have an obvious benefit in the delay. "It is "manifest (observes one of the Masters in his return) that "when the simple contract debts of a testator, or intestate, "or debts which bear no interest in their nature, are large, "it may be greatly for the benefit of the parties entitled to "the residue of the estate, to delay the report upon them, "and all subsequent proceedings tending to their payment. "The executor may in the mean time make interest, or "profit by the money remaining in his hands, and receive "the dividends, or interest on the stocks, or other invest-"ment of the outstanding personal estate, which, with the "rents and profits of the real estate, if liable to such debts, "will augment the ultimate surplus, or residuary funds, "either for his own benefit, or that of parties whom he is "commonly desirous to favour, the family, relatives, or other "devisees of the testator. That considerations of this kind "often lead to wilful delay (he continues), I have much "reason to believe. It was once actually suggested to me, "as a ground of excuse, when I was finding fault with an "eminent solicitor for the great delays and heavy costs of an "executorial account, of which he had the conduct in my "office, that the residuary devisees had already saved much "more on the simple contract debts bearing no interest, than "the whole costs of the cause." To counteract this mischief, it will be expedient to leave it in the discretion of the court, having regard to the circumstances of the assets, to allow, or disallow interest from the date of the Master's report to creditors whose debts do not in their nature carry interest. Of course, this discretion will not be exercised to the prejudice of other creditors, or to the prejudice of creditors whose debts carry interest. The object is to enable the court to do justice between the creditors whose debts do not carry interest, and the residuary legatees, or devisees.

Prop. 134.] UNDER the existing practice of the court, the parties upon the record have sufficient means of ascer-

taining the different steps which have been taken in the cause, with the precise nature of each of such steps. But the practice does not concede information equally explicit to strangers, nor, indeed, to persons who, though not in strictness parties upon the record, are, as creditors or legatees, materially interested in the nature of the cause. It must obviously be highly conducive to justice, that every facility should be afforded to persons, however remotely interested, to obtain a perfect knowledge of the actual state of any cause, at any given moment, or in other words, the precise dates of the different proceedings in it. It must unquestionably be a check to delay, and at the same time must furnish the party with the means of protecting himself against his own professional agent. The resolutions with respect to the master's offices, provide the means of obtaining this information after the cause has got into the Master's office. It only remains to afford the same facility previously to the cause entering the Master's office. That all persons may readily obtain this information, it should be the duty of any of the clerks in court, to whom the application should be made, to furnish it upon receiving a moderate fee, which, whilst it will remunerate that officer, will have an obvious tendency to repress impertinent curiosity, as the gratification of it must be attended with some expense.

Prop. 135, 136.] A BILL for an account usually, if not invariably, contains a submission on the part of the plaintiff to pay the amount, if any, which may be found due from him to the defendant on the taking of the account; but although to such a bill the defendant should put in an answer submitting to have that very account taken which the plaintiff has prayed, and thus submitted to be bound by the result of, yet if the plaintiff should not choose to prosecute his suit, the defendant has no alternative conceded him by the existing practice; he can merely dismiss the bill for want of prosecution with costs, and must have recourse to another suit, in which he changes sides, and in his turn becomes the plaintiff. Some of the most experienced and intelligent of the persons examined concur in opinion, that this part of the practice strongly calls for alteration, and it is obviously beneath the dignity of a court of justice to allow its forms to be thus trifled with; to allow a suitor to come into court and tender terms as those by which he would abide, and then at his pleasure to withdraw himself, after he had extorted, on the faith of those terms, a full discovery from the defendant. The evil

should be corrected in the particular case put, by allowing the defendant an option, should the plaintiff desert his suit, of dismissing it for want of prosecution, or of applying upon motion or petition for a decretal order for the account; and which order, if pronounced, should in all respects be equivalent to a decree at the hearing. But as it is obvious, if the rule were to stop here, an artful plaintiff, in order to avoid the effect of it would, in the particular case, set down his cause, and then abandon it at the hearing, for the purpose of having it dismissed with costs merely; this leads at once to the consideration of another of the existing rules, namely, that if a plaintiff make default at the hearing, the only decree which the court can make is a decree of dismission with costs. Whatever argument may be adduced in support of this, as a general rule, it is productive of the grossest injustice, when the bill seeks an account, and is founded on the express, or tacit submission on the part of the plaintiff, to abide by the result of it. If the plaintiff obviously ought not in an earlier stage of the cause to be allowed to withdraw from that pledge he had tendered to the court and to his opponent, it follows, he ought not to be permitted to do it at this late stage of the cause, when so much additional delay and expense have been incurred; but the defendant ought, on the contrary, to be at liberty to apply for a decree for an account, instead of dismissing the bill. And such decree, if pronounced, should in all respects be as effectual as if it had been obtained by the plaintiff.

Prop. 137.] When upon the case disclosed by the pleadings on both sides, it is evident, that some certain decree must necessarily be made at the hearing, it would tend materially to shorten the time consumed in the cause, and to lessen the expense, if the court had the discretionary power to pronounce an order to the effect of the decree which would be made at the hearing, supposing the cause were regularly prosecuted. This should be upon the summary application of any of the parties to the suit; and in order to extend the benefit of the rule to suits for the administration of assets, it should not be confined to such persons only, but creditors or legatees should be allowed to make such an application.

Prop. 138.] In a great variety of cases the judgment pronounced at the hearing of the cause, is in effect little more than an interlocutory order, though in technical parlance termed a decree, directing some inquiry, or some accounts preparatory to the real and substantial decree to be pronounced

upon further directions. In all these cases it would obviously tend to save much time, if the court had the discretion, when all the answers are in, which it has actually (and that beneficially) assumed in suits for specific performance of contracts, to direct upon the motion of either party any such inquiries, or accounts, leaving the plaintiff pending the prosecution of the inquiry, or the taking the accounts to proceed in preparing the cause for hearing. If the Master's report shall be made before the cause comes on to be heard, it should be heard upon such report, as well as upon the other matters in issue.

Prop. 139.] It is to be collected from the evidence, that the time of the court has in some instances been occupied for several days in succession in hearing numerous counsel for the same party, and that there is not in the court of Chancery any limit to the number of counsel which any suitor may employ; and one of the witnesses alludes to a particular case in which he states eight or nine counsel were actually employed on one side. At a period when it has become absolutely necessary, from the numerous demands on the time of the court, to guard against every unnecessary consumption of it, this is a grievance which stands in need of correction, and such correction obviously is by limiting the number of counsel to be heard on the behalf of any one party. The courts of law do not permit an unlimited number of counsel to be heard for the same party, and by analogy to the rule which prevails in the House of Lords, two counsel on each side appear to be sufficient in a court of equity, unless there should be two or more defendants in the same interest, and then each of such defendants should be at liberty to name one counsel. If any inconvenience should in any particular instance appear to flow out of this rule, the court has the power of providing a remedy, by directing a further argument by the same or other counsel. This subject, indeed, should not be dismissed without adverting to a point immediately connected with it, namely, that the litigating parties should (if they chuse to select such two counsel from the outer bar) be allowed for them in costs in the same manner as they would, if one of them had been taken from the inner bar; it being consistent, not only with the due administration of justice, but with the honour of the bar itself, that the suitor should be wholly unfettered in his choice of those advocates to whom he delegates the conduct of his cause.

Prop. 140.] It sometimes happens, that a cause cannot conveniently proceed, because a solicitor for one of the parties,

or his clerk, is not present, or by reason that the papers necessary for the use of the Judge have not been delivered according to the practice of the court. The solicitor is allowed a fee for his attendance, and another fee for these papers. He has assumed a duty which he ought to discharge, and as an officer of the court he should be present, and prepared with that which is necessary to forward the hearing of the case. Though he cannot remunerate the parties for the injury which possibly may result from the case being postponed, he ought to repay the costs occasioned by his neglect, if the court shall think fit to order him to do so; nor is it any answer to this proposition, that it is hard, as visiting the solicitor, but leaving the counsel untouched: that is an objection rather to the limited extent of the proposition, than to the proposition itself.

Prop. 141.] It seems to be conceded, that the clerks in court and waiting clerks, do not discharge any duty in return for the fee of 3*s.* 4*d.*, which by the order of the 26th of February 1807, is allowed them expressly "for every day "a cause is in the paper for hearing." (*Ord. Ch. Ed. Beam.* 474). As this, therefore, is a fee without a duty, it should be no longer allowed them. The same observation applies to the fee of 6*s.* 8*d.*, which by the same order is allowed them "for every day a cause, appeal, re-hearing, or further direc-"tions shall be in hearing, or in the paper after part heard."

Prop. 142.] The taxation of costs, according to the existing practice, is assigned to the Master of the court. This duty is discharged either by the Master in person, or by his chief clerk; in either case the assistance of a clerk in court is called in; but though material use is made of his assistance, the Master, in the eye of the court, is the taxing officer: the taxation is considered his; he signs the certificate, and his certificate officially ascertains the amount. Various objections have been taken to this mode of taxing costs; it has been alleged, that from the number of the Masters there is not a sufficient uniformity in the principle, or indeed in the rule of taxation; that some of the Masters are more liberal in their allowances than others, thus indirectly holding out an inducement to the solicitor to get matters into their particular offices; that virtually the taxation is that of the clerk in court, and is thus discharged by a deputy, who is not responsible to the public. It may easily be conceived, that from the number of the Masters, there must be some want of uniformity in the principle of taxation,

an evil inseparable in some measure from several independent jurisdictions, and which would in some degree be diminished by reducing the number of taxing officers. But there is great reason to doubt the correctness of the representation, that the duty of taxation is so entirely left to the clerks in court, as to deprive the public of the responsibility of the Master, or the benefit of his superintendence. On the contrary, the Masters appear to exercise a distinctly pronounced judgment upon all disputed items, those which the party himself acquiesces in evidently requiring none of their attention. Some difference of opinion exists amongst the persons examined, upon the question, whether the Masters or certain separate officers should discharge the duty of taxation; but the general opinion is strongly in favour of the latter proposition, to which there is the greater reason to subscribe, as the effect of the propositions recommended by the commissioners with respect to the Master's Office, will necessarily be, to delegate to the Masters many new duties, and those of a higher character, and consistently with the due discharge of which the taxation of costs generally would be totally incompatible. There are various reasons, however, why the costs of approving and appointing receivers, managers, consignees, and committees of lunatics' estates, and of passing their respective accounts, should still be left with the Masters, though it is expedient, with reference to the objects mentioned, that the Masters should in all other respects cease to be the taxing officers.

Prop, 143, 144.] If a reduction of the number of taxing officers will tend to produce a greater uniformity in the principle of taxation, that object will still further be promoted by rendering it their chief business. Less than six, however, would, as it seems, be inadequate to discharge the duty with all that promptitude, which the interest of the suitors require. The creation of new officers for the purpose, would, obviously, be necessary, if there were no officers of the court to whom it might be transferred. As the six clerks are not fully occupied by their present duties, the taxation of costs generally (with the exception already mentioned) may be allotted to them: but, as the whole of their time will then be taken up, it is apprehended, that the duty of attending court for the purpose of reading evidence and documents, a duty which in term-time has, so far as concerns the Lord Chancellor's court, been hitherto performed by the six clerks, should hereafter be discharged by other officers; and, it should be extended to the courts of the Master of the Rolls and the Vice

Chancellor, in which it is equally necessary, and should apply to sittings out of term, as well as in term, because the occasion is the same in each instance. The duty of attending the Lord Chancellor and the Vice Chancellor's courts might be allotted to the two entering registrars; and the duty of attending the Master of the Rolls's court to the secretaries of the Rolls; an adequate remuneration being, in each instance, allowed them. In naming the two entering registrars, some importance has been attached to the circumstance, that these officers are now in a great measure unemployed, discharging their duties by deputies; but, what has chiefly weighed, is the consideration that as those officers, if there be no objection, and there should be no virtual change in the constitution of the office, will succeed, much as a matter of course, to be deputy registrars, and stand the very next in succession to fill that office, their frequent attendance in court will necessarily be the best preparation for the office they are about to be called upon to fill, as the occasional reading of evidence, or documents, must obviously leave them the greater portion of their time to observe what is passing in court, and to take notes of the practice, an advantage of which it is to be presumed they would not fail of availing themselves. In naming the secretaries to attend the Master of the Rolls, no great additional duty is imposed upon them, as the one, or the other of them is generally in the court, whilst it is sitting.

Prop. 145, 146.] SEVERAL of the present six clerks are persons, either much advanced in years, or of infirm health, and they would, therefore, be in a great measure inadequate to the discharge of the active duty of taxation, in addition to the other duties of their office. Independently of which, they came into office, when it had unattached to it the duties now proposed to be thrown upon it, and their office leads to nothing of a higher nature, and has no retiring salary although it is a freehold. It would seem, therefore, that they should, in order to make way for the immediate appointment of effective, taxing officers be allowed to retire. As there is no imputation upon them, and no misconduct of theirs leads to their retirement, but the interest of the public requires it, it is obvious, that consistently with justice, they ought to sustain no loss. It is on these grounds, that they should be allowed to retire upon pensions equivalent to their present emoluments as six clerks, and clerks of the enrolments, and controllers of the Hanaper, (offices they unite with that of six clerks),

taken upon an average of the last three years. As the duties of the six clerks will be materially increased by making them taxing officers, they should be adequately remunerated by an allowance proportioned to their new duties, in addition to their present fees.

Prop. 147.] DURING a long period of time, the costs between party and party have borne no proportion to the costs between solicitor and client, the former being regulated by a strict rule, conceding in many cases only a very inconsiderable portion of the sums actually expended, and leaving, therefore, to the successful party the burthen of a considerable portion of such expenditure, whilst the proper costs between solicitor and client approach, in most instances, to a fair remuneration for skill and trouble, and a just reimbursement of actual disbursement. Whatever policy there may be in checking, rather than encouraging, the spirit of litigation, it is difficult to discover the abstract justice of a rule, which conceding to the successful party that he ought to have his costs from his antagonist, withholds in point of fact, a great part of his expenditure, and compels him, possibly, to dispose of a considerable part of that fund he has recovered, barely to answer the expense he has been at in recovering it. In some instances, this must have operated to deter persons from prosecuting their just rights, and in others, it must have been productive of compromises, by which justice has been sacrificed. To remedy these mischiefs the principle which is now applied in the taxation of costs as between solicitor and client, should be applied in the taxation of costs as between party and party; but this rule should not be acted upon, if any of such costs appear to have been unnecessarily, or unreasonably incurred, consistently with the corresponding rule which was framed for the court of Chancery in *Ireland*: "that in taxing costs between party and party, the Master "shall allow the party decreed, or ordered to be entitled "thereto, his costs actually incurred as between attorney and "client, so far as the same were actually necessary and pro-"per for the attainment of justice, or defending his rights, "but not any costs incurred through over-caution, negli-"gence or mistake, to the end that the costs to be taxed be-"tween party and party, may, as near as possible, equalize "the costs which would be taxed between attorney and "client, if the proceedings had been conducted with strict "regularity and diligence, without any unnecessary caution "and with the necessary asssistance of counsel."

Prop. 148.] Adverting to the present practice, if a party is entitled to the benefit of an express order for payment of costs, or is entitled by the course of the court to costs from his adversary, and is put to the necessity of suing out process to compel, in either case the payment of such costs, it seems he must himself bear the expense of such process, which a vindictive opponent will therefore always throw upon him, by declining to pay the costs until it has been sued out. The court is bound, if possible, to enforce an implicit and prompt obedience to its orders. But if, from a contumacious neglect of one order, it becomes necessary to sue out another against the same party, as he is obviously the person in the wrong, he ought to pay this additional expense. There can be no justice in throwing it upon his innocent opponent, who is sufficiently injured by having the fruits of the judgment withheld from him during the time he is running through the different proceedings. On these grounds, there can be no hesitation in recommending, that the party to pay the costs, should, at the same time, pay the additional costs occasioned by the process to enforce the payment of such costs; and, as he may always avoid this expense by performing an act of simple justice, namely, by paying the costs in the first instance, he cannot have any reason to complain. But, to prevent the delay and expense arising from the taxation of the costs of such process, the amount may be certified by the clerk in court of the party to receive them.

Prop. 149.] If a party should not obey an order or decree, and it becomes necessary to issue a writ of execution, and he then pays obedience to the order or decree, without putting his opponent to issue an attachment, he does not, though in default, pay the costs of such writ of execution, which thus fall upon the party suing it out. For the reasons already given, the costs of the writ of execution ought to fall upon the party who has not obeyed the order or decree; but to prevent such writ of execution being on the other hand sued out needlessly or vexatiously, there should be on the part of the person suing it out, an affidavit of demand upon, and disobedience by, the party charged by the decree or order, who will always, by obeying in the first instance such decree or order, have it in his power to avoid the expense of the writ of execution. To obviate the delay and expense arising from the taxation of the costs of the writ of execution, the amount should be certified by the clerk in court of the party to receive such costs.

Prop. 150.] If a party should not perform an act directed to be done by him, his opponent is obliged to have recourse to an order *nisi*, in other words, he must obtain an order that such party should stand committed, *unless* he do the act required. But the person suing out this order, which the refractory conduct of his opponent has rendered necessary, loses the costs of it, if the act be then done, and no further process is had recourse to. Consistently with the principles already adverted to, the costs of the order *nisi* ought to be paid by the party whose conduct has led to its being sued out, although he does the act required without further process; such costs to be certified by the clerk in court of the party to receive them. Whether the person be, or not, a party to the suit ought to make no difference.

Prop. 151.] When the plaintiff is out of the jurisdiction of the court, in other words, beyond those limits to which its process extends, the defendant is entitled to require a security for the costs of the suit, should the plaintiff ultimately fail. Though the Commissioners have not concurred in the suggestion of one of the witnesses, that the plaintiff should in all cases give security for costs before answer, inasmuch as it would destroy all analogy between suits in equity and actions at law, independently of throwing impediments in the way of justice, favouring the rich suitor at the expense of the indigent one, and that too in a country whose boast it is that paupers may sue for their rights;—they have adopted the opinion expressed by Lord *Hardwicke*, that regard being had to the decreased value of money, the sum of 40*l.* is too low as the amount of the security to be given when the plaintiff is out of the jurisdiction: it is apprehended, that it should be increased to 100*l.*

Prop. 152.] If costs are ordered to be paid by a person not a party to the suit, the mode of compelling payment is to obtain an order: if that order is disobeyed a second order is applied for, which directs the party to pay within a certain time, or stand committed; and if that order is likewise disobeyed, a third order is obtained, being an absolute order of committal; whilst, if the person to pay be a party to the suit, the *Subpœna* and attachment are alone necessary. There seems no satisfactory reason why this more expeditious and less expensive course should not be had recourse to against a person not a party, in the same manner as the payment of costs is compelled, when the person to pay them is a

party in the cause. The benefit of this alteration should be extended to orders in bankruptcy.

Prop. 153, 154.] A PARTY upon taking exceptions to the Master's report, makes a deposit of 5*l.* under an order made in 1710, and upon appealing from any decree or order, or upon obtaining a re-hearing of any decree or order, he deposits 10*l.* under an order made in 1720. (*Ord. Ch. Ed. Beam.* 320, 327, 459.) However adequate these particular sums might have been at those periods, they are now very disproportionable to the costs really incurred, and the consequence obviously is, that their inadequacy promotes, rather than checks, frivolous and vexatious exceptions, &c. On these grounds, it seems expedient that they should be increased to double the sum in each instance, and if the exceptant, or appellant fail, he should, instead of being eventually liable to such further costs as the court shall direct, pay such further costs as have been occasioned by the exceptions, re-hearing, or appeal, unless the court think fit to adjudge the contrary. If the costs ought, by analogy to the general rule in the first instance, to follow the event, the court will have the power to relieve, when the case requires it; and such a rule will deter parties from having recourse to frivolous exceptions, re-hearings and appeals, but will not prevent a party, having a serious ground to question the decision against him, for carrying it to a higher tribunal.

Prop. 155.] IF the court directs a party to execute a deed, or instrument, and such party contumaciously refuses to do it, such refusal ought not to be suffered to defeat the ends of justice, but the court ought to be invested with a power of giving full and entire effect to its own orders, of directing one of its own officers to execute such deed or instrument, which, when so executed, ought to have the same force and validity, as if the party himself had executed it. The principle of this provision is not now for the first time attempted to be acted upon. The Bankrupt Act, (6 *Geo.* 4, *c.* 16, *s.* 78), enables the Lord Chancellor in given events, to order the bankrupt to join in any conveyance of his estate, and if he refuses so to join, the bankrupt is estopped from objecting to such conveyance, and is as effectually barred by the order, as if the conveyance had been executed by him. But the court ought to have the power of impounding the deed, and especially if the order which directs the Master to execute such deed should be appealed from, the court ought to be allowed to impound the deed,

until the appeal has been determined. After the execution of the deed or instrument by the Master, notice of such execution should be given on the same day by the solicitor, to the party in whose name it is so executed, who, upon the proper application and payment, or tender and refusal of the costs of his contempt, should be discharged as to such contempt.

Prop. 156.] WHERE a party obstinately retains possession of lands after a writ of execution of an order for delivery of such possession has been duly served, and demand of possession made, and there be an affidavit of the service of such writ of execution, and of such demand made, and a refusal to comply therewith, the party prosecuting such writ of execution should be at liberty to issue not only the attachment for breach of such writ, but also the writ of assistance. The intermediate writ of injunction, commanding the party to deliver possession, seems utterly useless; the result, probably, of that over-caution which marked the infancy of the jurisdiction, and is attended with the practical inconvenience of adding to the expense, without any equivalent benefit.

Prop. 157.] AN erroneous notion seems to have taken possession of the minds of some persons, that counsel are, in a particular class of causes at least, justified by the existing practice of the court in inventing a case for the plaintiff, or, in other words, in framing a statement which has no existence whatever, in point of fact, though it is the case gravely put forward by the bill, and though the defendant is as gravely called upon to answer it. If this were the practice of the court of Chancery, it would call for the most severe reprehension, and it would obviously require an alteration. But, as the notion, although to a very limited extent, has prevailed, however inconsistent in itself with the rule of the court, which requires the signature of counsel to the bill, and however incompatible with the best interests of justice, and with the honour of the bar, it seems expedient to provide, by an express resolution, that no counsel should prepare, or settle a bill, without written instructions from the solicitor, and that the signature of counsel to a bill should, in future, be considered as a certificate, that, assuming the instructions to be correct, it is not unfit that a bill should be filed.

Prop. 158.] IF the same solicitor is concerned for two or more defendants in the same cause, there is nothing in the present practice which prevents him from putting in a separate answer for each defendant, to the obvious increase of the

expense. It may be perfectly proper that he should, and he may be bound by the sound advice of his counsel, to take the course of putting in a separate answer for each defendant. On the other hand, it may be a totally useless expense. It is, therefore, proposed, that the taxing officer should judge of the propriety of the solicitor's conduct in this respect, and that the judgment of such taxing officer upon it should be final.

Prop. 159.] THE parties in a cause, plaintiffs and defendants, are always represented by their clerks in court, upon whom service is good in all cases, with the exception of such cases as require personal service. But, embarrassment in the progress of a cause, or matter sometimes arises from the difficulty of serving a person whose residence is unknown, or who lives in the country, and who, not being a party in the cause, is not represented by a clerk in court. If he is suffered for his own benefit to appear by a solicitor, it is difficult to discover any satisfactory reason why, for this purpose, he should not be considered for the benefit of other parties, as represented by such solicitor. It is, therefore, conceived, that if a person not a party appears upon any proceeding, whether in a cause, or in any other matter, service upon the solicitor in London through whom he acts, whether such solicitor act as principal or agent, ought to be deemed good service on such party; excepting, however, from the operation of this provision, cases of contempt, which by analogy, to the general rule, and out of regard to the liberty of the subject, require personal service.

Prop. 160.] ACCORDING to the order of 1649, no special motion can be made without "two days personal notice," (*Ord. Ch. Ed. Beam.* 115), which, in construction, has been deemed one clear day's notice, a notice for Thursday being good if served on the preceding Tuesday. It may be questioned, whether this is the right construction of the terms of that order. At all events, such construction was productive of little, or no inconvenience, when motions were of a simple nature; but as they now often embrace points of considerable intricacy, and are founded on affidavits which require to be answered, it would seem expedient, that notice of them should be given at least two clear days before they are to be heard, to prevent the time of the court being, as it now frequently is, occupied in disposing of applications, in order that motions should stand over. The same observation applies to petitions.

Prop 161.] ORDERS *Nisi* to confirm reports can only be obtained by motion, which rule is productive of unnecessary delay out of term, as the days for motions then only occasionally occur. To prevent this delay, it seems expedient, that such orders should be had upon petition, which may be presented any day. These orders are served upon the parties personally, unless the court, on the ground that such parties are numerous and live remote from each other, or that it is impracticable to serve the parties personally, make an express order, directing that service on their clerks in court, should be deemed to be good service. It will save both time and expense, that service on the clerk in court should always be deemed good service; and that the special order for such purpose should thus be got rid of.

Prop. 162.] SOME delay appears to be the consequence of the rule, that a defendant who has been restrained from proceeding at law, cannot out of term obtain the order *nisi* to dissolve the injunction but by motion, which must be made on a seal day, for which he may sometimes have to wait more than a week. This should be obviated, by allowing the order *nisi* to be obtained out of term by petition at the Rolls; but to prevent surprise, the order made on such petition should be served two clear days before the seal day.

Prop. 163.] IT has been in evidence before the Commissioners, that the rule which enables the defendant to read any part of his answer, which either by the peculiar frame of the passage read by the plaintiff, or by reference, can be substantiated to be part of any passage read by the plaintiff, conduces to the length, intricacy of form, and consequent expense of the answer itself. The rule which makes the defendant's power to read any passage not previously read by the plaintiff, to depend upon this passage being, or not being either grammatically, or by reference, a part of or incorporated with a sentence previously read by the plaintiff, seems difficult to reconcile with that simplicity of pleading so desirable to preserve in courts of equity; and the rule itself must obviously in practice have the effect of adding materially to the time consumed by the draftsmen, in framing the answer, to which it has a strong tendency to give a kind of scholastic refinement. It seems to be far preferable, that where a plaintiff reads any part of the answer as evidence, the defendant should be entitled to read any other part of his answer, which explains or qualifies the passage read by the plaintiff,

although not grammatically or by reference connected as a member of the same sentence. When, however, a fact be affirmed in such explanation or qualification, the defendant should not, in the absence of proof, have the benefit of such fact in evidence, a rule observed in the civil law courts, unless it appear upon the answer, that under the circumstances, such fact is not capable of proof. Nor should the rule prevent the court from referring to the whole answer; nor indeed the defendant himself, when by the rules of the court he is entitled to refer to it; as for example, when the cause is set down upon bill and answer, when questions of costs are raised, &c. It has been pressed upon the Commissioners, that an entire alteration should be made in the existing rule; and that by analogy to the rule prevailing at law, the defendant should be at liberty to read the whole of his answer, if the plaintiff read any part of it. But the effect of such a rule in equity would be to put the suitors in many cases, to an immense additional expense. The plaintiff now only proves those facts essential to his case, which the defendant does not admit by his answer; and the plaintiff reads those facts from the answer which the defendant does admit. To prevent the plaintiff reading out of the answer, those admissions of facts which such answer contains, and that would be the effect in all those instances where there was some one material fact which the defendant denied, or where there were any facts constituting wholly or partially a defence, would be to put him to the expense of proving that which his opponent, so far from controverting, admits by his answer, and would (contravening the general maxim, that what the litigating parties admitted on their pleadings, required no proof), be often in the result, and when he had to pay the costs, more injurious to the defendant than to the plaintiff, and in that view, would enable a litigious plaintiff to harass a defendant.

Prop. 164.] If a witness, whose evidence is necessary in an action at law, reside abroad, the party requiring his testimony may apply to the court of law in term time, or to a Judge in the vacation for a rule or order, to have such witness examined before commissioners specially appointed and approved by both parties. But "the rule or order for such "examination cannot be obtained without the consent of both "parties, as the depositions are only secondary evidence." (*Phillips on Evidence*, 15). If the adverse party will not consent, it seems to be the doctrine of two cases, (*Furley* v. *Newnham*, *Doug.* 419, *and case cited Cowp.* 174), that the court of law will assist the other party by putting off the

trial, in order that there may be an opportunity of filing a bill in equity until the consent is obtained, or the witness returns; and that if after all, the defendant should refuse to consent, such court of law would not give him judgment, as in the case of a nonsuit. But in a subsequent case the court of Common Pleas appears not to have been satisfied "that it was "proper for them to compel a party by indirect means to do "what they had no authority to compel him to do directly." (*Calliand* v. *Vaughan*, 1 *Bos.* & *Pul.* 210). Thus the matter appears to rest, if the necessity of a commission to examine witnesses residing abroad arise in the course of an action at law, unless indeed the cause should fall within the statute of 13 *Geo.* 3, *c.* 63, *s.* 40, 44, the latter section applying to "action or suit in law or equity, for which cause hath arisen "or shall hereafter arise in *India*." The consequence is, that parties wanting a commission to examine witnesses abroad, where their opponents will not consent, and where the case does not fall within the statute just mentioned, are compelled to file a bill in equity to obtain such commission. This occasions considerable expense. It seems expedient, therefore, to give to the courts of law the power of awarding such commissions, and to confine the power to those courts, unless in cases where the actual purpose of the bill is likewise to obtain a discovery; but, inasmuch as the bill on which the commission is now obtained is *in form* a bill for discovery, it is requisite that the fact, that discovery is the actual purport of filing it, should be verified by affidavit to be annexed to the bill. If this precaution be not adopted, it might be apprehended that such bills would continue to be filed, although there were no other object really in view, but that of obtaining the commission to examine witnesses resident abroad.

Prop. 165.] THE attention of the Commissioners has been called to an evil, which is noticed in the following extract from the Report of the Lords' Committee (page 12). "It has "been stated to the Committee, that of late years, and not "till of late years, except very rarely indeed, parties have "been brought before the Chancellor, by writs of *habeas* "*corpus*, in order for their discharge, if their imprisonment "should, upon the discussion, appear to be illegal, and in "cases in which formerly the common law courts and com-"mon law judges had been almost always applied to. This "takes place generally in cases of commitments by commis-"sioners of bankrupts. It having been doubtful whether the "Judges of the Common Pleas and Exchequer could grant "this writ in vacation, an act lately passed, empowering each

" of the Judges to grant it. It has been, therefore, suggested, " that as this species of application to the Chancellor was for- " merly unusual, and has of late occasionally employed much " time, he might be authorized to refer (in cases in which it " might appear to him reasonable so to do) the consideration " of matters of this nature to some of the Judges of the other " courts of Westminster Hall." It is obvious, that the evil noticed in these extracts is a public evil to the suitors in general of the court of Chancery, by withdrawing very frequently and sometimes for several days in succession, the attention of the head of the court from the more immediate business of it, at periods too when most, if not all, of the law Judges are in town, and accessible. The remedy for this evil appears to be that suggested by the report of the Lords' Committee, namely, to allow the Lord Chancellor, when he may think it necessary, to make the writ returnable before any one of the common law Judges, and requiring that such Judge should proceed to dispose of the question.

Prop. 174, 175.] It would tend to add weight and dignity to the office of the Vice Chancellor, if that Judge were placed on a footing equally independent with the Master of the Rolls, except as to matters in bankruptcy. To effect this, a repeal of part of the statute of the 53 *Geo.* 3, *c.* 24, will become necessary, and a legislative sanction to the newly-created jurisdiction will be requisite, especially to mark out the detail necessary to carry it into execution. It should be added, that the Vice Chancellor should not have authority to alter, vary, or discharge any decree or order made by the Lord Chancellor or the Master of the Rolls, unless in the particular case provided for by the regulations, namely, where the order has been made on a motion or petition, as of course, and if the suitors should avail themselves of setting down any cause, matter, or thing, before the Lord Chancellor, he should be allowed to direct, that the same should be heard by the Vice Chancellor.

Prop. 176.] If a party be dissatisfied with the decision of the Master of the Rolls or Vice Chancellor, made on the hearing of a cause, or on further directions, he cannot carry the question by appeal to the higher tribunal but by a petition, accompanied by the certificate of counsel, stating that it is proper to be reheard. There is however no such guard imposed by the practice of the court with respect to appealing from decisions on motions, when such motions have been heard before the Master of the Rolls or Vice Chancellor,

although they frequently embrace matters of as much importance to the parties, as those disposed of on the hearing of causes. This, indeed, is a reason why the parties should not be precluded from appealing; but it is not a reason why such appeals should not have some guard placed upon them, to prevent their being used as an instrument of vexation; especially, as on the other hand, many of these motions are of a very trivial, not to say frivolous, description, and it must tend to lessen the weight of the Judge in the opinion of the suitors, when his decision can at once be carried before another Judge without any intervening ceremony or form, save that of the mere notice of motion. For these reasons the parties should not be allowed to appeal from decisions on motions, unless upon a certificate of counsel, to the effect stated in the proposition; and for the reasons stated in another part of this paper, the parties should, on the hearing of such appeal motions, be confined to the same evidence as was used in the court below.

Prop. 177.] THE provisions of the statute of the 53 *Geo.* 3, *c.* 24, prevent the Vice Chancellor from "discharging, "reversing, or altering any decree, order, act, matter or "thing, made or done," by the Lord Chancellor, or Master of the Rolls. This applies to an order made upon any petition, or motion, although purely of course. These orders are granted upon being asked for, and drawn up and passed by the registrars or secretary, in the ordinary routine of their official duties, without ever being mentioned to the Lord Chancellor, or Master of the Rolls. There is no difficulty in perceiving, that orders on which the Lord Chancellor or Master of the Rolls have exercised their judgments, should not be discharged, or varied by the Vice Chancellor, because that in effect would be to constitute the Vice Chancellor the Judge in appeal from the Lord Chancellor, and the Master of the Rolls; yet, that reason wholly fails when applied to orders of course, and the consequence of the provision of the statute of the 53 *Geo.* 3, is, that a person against whom any of these orders of course, in the name of the Lord Chancellor, or Master of the Rolls, have issued, cannot, if he think himself aggrieved, discharge or vary them, but by applying to the Lord Chancellor, or Master of the Rolls, as the case may be. This is the occasion of considerable delay, as from their important avocations elsewhere, and other causes, the Lord Chancellor, and the Master of the Rolls, are not equally accessible at all times with the Vice Chancellor, who is, generally speaking, daily sitting in the court of Chancery.

Whilst the delay arising from this circumstance would be obviated by allowing the Vice Chancellor to discharge, or vary orders of course made by the Lord Chancellor, or Master of the Rolls, no injury could possibly flow out of such an alteration of the Act of the 53 *Geo.* 3. Indeed, any one of the three Judges of the court ought to be allowed to discharge, or vary any order made by either of the other two Judges, when such order has been made upon a motion or petition, as of course; or, in other words, when such order is an order of course.

Prop. 178.] MUCH inconvenience and injustice must obviously be the result of permitting a party, dissatisfied with the judgment of the Master of the Rolls, or Vice Chancellor, to appeal to the Lord Chancellor at any distance of time. To obviate such inconvenience and injustice, as applied to the Master of the Rolls, (the office of Vice Chancellor being, as is well known, not then in existence), an order was made on the 5th June 1725, requiring, that "if any person shall be advised "to appeal from any decree made by his Honour the Master "of the Rolls, that such petition be presented within one "month after such decree pronounced." (*Ord. Ch. Ed. Beam.* 334). This regulation was repeated by the subsequent order of the 9th of July 1725, (*Ord. Ch. Ed. Beam*, 338); but it is evident from the cases in the books, that the rule laid down in these orders has not been attended to, probably from the circumstance, that the time limited was found in practice to be "*too strait*," as elsewhere expressed. (*Ord. Ch. Ed. Beam.* 339). In spirit, these orders may be right, but they appear to prescribe too short a period to allow a party to be well advised on the bearings and consequences of the judgment. It would be better, that the time within which a party should be allowed to appeal from a decree or order of the Master of the Rolls, or Vice Chancellor, should be six months, a period sufficiently long to permit him to obtain the best advice upon the effect of the decree, or order, but yet too short a period to allow of its being taken as the means of delay.

Prop. 179.] IF inconvenience and injustice are the consequences of permitting a party to appeal, at any distance of time, from one Judge to another, they must equally result from allowing him to rehear, that is, to appeal from the same Judge to himself at any interval of time. The order of the 30th of April 1700, applying simply to the case of a party suffering a decree *nisi* to be made absolute, provides that in

case he "shall not before the end of the next ensuing term "procure an order to rehear the said cause, the party after "that term shall not be admitted to rehear the said cause." (*Ord. Ch. Ed. Beam.* 315). The order of the 25th of June 1825 provides, "that when any party shall be dissatisfied "with the judgment of the court given upon the hearing of "any cause, exceptions, pleas, or demurrers, they do, if so "advised, petition for a rehearing of such cause, &c. within "a fortnight after the order pronounced," (*Ord. Ch. Ed. Beam.* 334); a regulation that is repeated in the subsequent order of the 9th July 1725, (*Ibid.* 337). This period was extended by the subsequent order of the 27th of January "1726, to the "space of one month from the day the order "on hearing shall be pronounced, the sworn clerks having "represented, that the time limited by the said order (of the "9th of July 1725) for the rehearing of causes was too strait, "especially in such cases, where the suitors live remote, and "out of the post road." (*Ord. Ch. Ed. Beam.* 339). It would appear from the books that the practice has silently abrogated these orders. It must, however, be conceded, that on principle these orders were perfectly correct, and it is apprehended it would be, conformably to the spirit of them, highly beneficial that the period within which a party should be allowed to rehear should be limited, but it should be extended beyond that allowed him to appeal, as it sometimes happens, when a decree comes to be acted upon in the Master's Office, that some direction or inquiry, which is much a matter of course, and would almost upon being asked for be supplied upon a rehearing, is for the first time discovered to be omitted, or the decree though substantially right, is defective in some other respect which would equally be corrected upon being pointed out to the court. The court of *Exchequer*, by an order made in 1731, limited the period for rehearing to six months. That order has been acted upon from the time it was promulgated to the present, and although upon several recent occasions strong attempts have been made to induce that court to depart from it, those attempts have been made to induce that court to depart from it, those attempts have invariably been unsuccessful, such court expressing its conviction of the soundness of a rule limiting the period, allowed for rehearing, and that it was beneficial strictly to adhere to it. With this practical argument in favour of limiting the period allowed for rehearing, there can be no ground to apprehend any mischief in recommending, that it should be confined to the period of a year, the period of six months being scarcely sufficient to meet those cases

which may arise out of prosecuting the decree in the Master's Office, which have been already alluded to.

Prop. 180, 181.] From a variety of causes, the equity business of the court of Chancery has within the last twenty, or thirty years increased to a degree to render it morally impossible, that three Judges should dispatch it, unless recourse be had to arrangements which afford substantial relief from the pressure. One of the least objectionable modes of relief is, the restraining the limits beyond which the spirit of litigation should not be suffered to proceed, as there has already been occasion to remark, in other words, the restricting the almost interminable right of appeal, whether the appeal be brought forward as an exception, as a re-hearing, or as an appeal, strictly so termed. It has been noticed how many times the court might be called upon to consider, and to reconsider, and again consider, the apparently trivial question, whether a passage in a bill, or an answer was impertinent, or scandalous; and it has been recommended, that, upon a question of this description, and also upon a question of sufficiency of an answer or examination, the Master's judgment should be final, unless he permit it to be discussed upon exception. Now, if the restriction were to stop here, supposing the Master to have given his certificate, there would be nothing in the practice to prevent these questions being discussed again before the Master of the Rolls or Vice Chancellor; being heard a second time, by way of re-hearing, before one of those Judges; being a third time heard before the Lord Chancellor, and if he permitted it, a fourth time, by way of re-hearing; and then ultimately, a fifth time, discussed in the House of Lords. Whilst it must be unequivocally conceded that every suitor is entitled to be fully and fairly heard once, and that, if dissatisfied with the Judge's decision, he is entitled to have the soundness of such decision tried before another tribunal, by way of an appeal—whilst to this rule an exception, when speaking of the real matter in litigation, the substantial object of the suit, can scarcely be conceived, the mind must pause when this general rule is sought to be applied to interlocutory matters, especially as the courts of law do not permit their judgments in such matters to be disputed in appeal, proceeding upon principles of the soundest policy. But, laying interlocutory matters on one side, it is, perhaps, almost impossible to perceive the justice or understand the policy of conceding to a litigious suitor, the means of interminably trying the same question before a succession of tribunals; and, in trying that question, at the same

time trying in each instance the judgment of one Judge before the tribunal of another, and taking the chance, as he travels through a succession of tribunals, of discovering one that should be favourable to him. On the contrary, a right of litigation, which is limited alone by the means of gratifying it, places the poor suitor at the mercy of his rich antagonist; and at the same time, operates this hardship upon the other suitors of the court, that their causes are necessarily postponed to make way for the discussion and re-discussion of the same question between the same parties, in the shape, as the case may be, of exceptions, hearing, re-hearing, or appeal. The time of the court must be economized in justice to the suitors in general, and in justice to the court itself, and to its character with the country. The rules of the court must not be made accessary to the delay and expense of this interminable right of appeal. It is mistaken mercy to concede it, real mercy to restrict it. One and only one substantial and effective appeal should be given. In the case when the Master shall allow his opinion on the sufficiency of an answer to be questioned, it is apprehended this appeal should be granted at the opinion of the party dissatisfied, either to the Master of the Rolls, or to the Vice Chancellor, whose judgment should be final. In all other cases originally heard before the Master of the Rolls, or Vice Chancellor, there should be one appeal which the party should have the option of carrying to the Lord Chancellor, or to the House of Lords. As cases however of extraordinary difficulty may occur, the Lord Chancellor, supposing the appeal be to him, should not be precluded from directing the parties either to rehear before him, or to appeal to the House of Lords: but as an application by the parties to induce his Lordship to do the one or the other, would in effect, be in itself a species of re-hearing of his Lordship's own decision, the parties should not be at liberty to make this application, but the direction to re-hear, or to proceed to the House of Lords should emanate from his Lordship, and be in fact his own suggestion. If the decree be altered in favour of the appellant, the other side is to be at liberty to go to the House of Lords.

Prop. 182, 183.] PROCEEDING upon the technical notion, that every decree was the decree of the Lord Chancellor, though it was really pronounced by the Master of the Rolls, and that, until signed and inrolled, the decree, though pronounced by the Master of the Rolls, yet, as being the decree of the Lord Chancellor, might be altered or corrected by him, in taking into consideration further, or other evidence,

if in the cause, than was used before, or tendered to the Master of the Rolls, it has long been the rule, that upon what is called a re-hearing before the Lord Chancellor of a decision of the Master of the Rolls, further evidence than was used, or brought forward before that Judge, if in the cause, might be made use of, for the purpose of inducing the Lord Chancellor to reverse the original decision. The same rule prevails with respect to the Vice Chancellor's decisions, it being established with regard to the Master of the Rolls before the office of Vice Chancellor was created. It is very difficult to reconcile this rule to any abstract principle of justice. Although such a hearing before the Lord Chancellor is, consistently with this technical reasoning, termed a re-hearing, it is, obviously, neither more nor less than an appeal. If it be an appeal, the only question is, whether upon the evidence used before and tendered to the Master of the Rolls, or Vice Chancellor, such Judge did, or did not come to a right conclusion; for it must be borne in mind, that those Judges can know nothing of any evidence, but that which is used before, or tendered to them. This is the only question which a dissatisfied suitor ought to be allowed to try by appeal. It is the only question which the highest appellate tribunal in this country will try; the party appealing being, when he appears before the House of Lords, confined to the evidence before, or tendered to the court below; nor will the court of Chancery allow a bill of review, in other words an appeal from a decree inrolled, upon "any "new proof which might have been used when the decree was made," (*Ord. Ch. Ed. Beam.* 2.); a rule, at least, as ancient as the time of Lord *Bacon*. To keep that back on the original hearing, or, what is the same thing for the purposes of justice, to neglect then to bring it forward, and to adduce it for the first time before the appellate Judge, is *not* to try an appeal, is *not* to try the question, whether the Judge in the court below decided correctly on the evidence before him, but is, virtually, to try a new cause, which that Judge never heard, and respecting which, there is nothing from which it can be concluded, that his decision would not have been, that which the appellant contends it ought to have been. It seems an anomaly to transmit original causes to an appellate jurisdiction, and is a fruitful source of litigation, and a want of good faith to the Judge below, whilst it is a fraud on the opposite party, who ought not to be called upon to meet the case by piece-meal. I cannot likewise but advert to the impolicy resulting occasionally from the rule, in placing unnecessarily two Judges

of the same court in direct conflict with each other, who, in the result, apparently come to an opposite decision in the same causes, when, in reality, if the different evidence tendered to each be considered, they may be said to have heard different causes. This is an evil sufficient in itself to call for the alteration suggested, namely, that all appeals from the decisions of the Master of the Rolls and Vice Chancellor to the Lord Chancellor, shall be heard and disposed of upon the same evidence only as was used, or read, before the Master of the Rolls and Vice Chancellor; and, for the purpose of distinctly ascertaining what evidence was used, the decree should specify the evidence so read or used. An obvious exception to this rule will be, where the appeal is on account of the rejection, or admission of evidence. To give full effect, indeed, to the entire rule, it should be the duty of the registrar to make a note of all evidence objected to, whether such evidence was received, or rejected, in like manner as he should make a note of all evidence received, though unobjected to.

Prop. 184.] A PARTY dissatisfied with the decision, and conceiving that a different result would be the consequence of a further consideration of his case, sometimes chooses to have the cause re-heard before the same Judge. As this is, in effect, an appeal from the Judge to himself, and involves, in itself, the twofold mischief of expense and delay to his adversary, with the inconvenience to the other suitors of occupying as much, or nearly as much of the time of one of the judicial branches of the court, as would have been consumed in an appeal to the superior tribunal, justice seems to concur with the principle of economising the time of the court, in requiring, that the party electing to re-hear his cause before the same Judge, or the same branch of the court, should be bound by the judgment on re-hearing, which, as to him individually, should be final. This, however, should not preclude his adversary from his right to appeal, nor should it prevent the court itself from directing a re-hearing, if the purposes of justice require it in the opinion of the court.

Prop. 185.] IN the stages of a cause subsequent to the hearing, clerical mistakes, or errors arising from an accidental slip or omission, are sometimes discovered in decrees, which justice requires should be corrected. The expense and delay of re-hearing, (and a re-hearing is necessary by the present practice), for the mere purpose of correcting such

mistakes or errors, may be got rid of, without, as it appears, any injury to the suitors, by allowing them to be corrected on an application by petition; but this application should not be permitted after inrolment of the decree, it not being intended to interfere with the rule contained in Lord *Bacon's* orders, that "no decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review." (*Ord. Ch. Ed. Beam.* 1).

Prop. 196.] THE ancient rules of the court, founded upon sound principles, declare that "no bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed, unless the court should make an order to the contrary;" and that "when any rehearing is granted, such rehearing shall not in any way stop, or hinder any proceedings, on the order, or decree appealed from, without special order of this court; but the party in possession of any order shall be at liberty to proceed thereon, as if no appeal, or rehearing was granted." (*Ord. Ch. Ed. Beam.* 3, 266). It seems to have been long understood, that an appeal transferred the decree to the jurisdiction of the tribunal appealed to, which therefore could alone stop the execution of the decree, and make the order for that purpose above alluded to; hence when a decree of the Master of the Rolls, or Vice Chancellor is appealed from to the Lord Chancellor, and the appellant has been desirous of delaying the execution of any part of such decree until the appeal was heard, he has been compelled to apply to the Lord Chancellor by motion for such purpose. Obviously the Lord Chancellor could not refuse to hear such motion, but he could not satisfactorily dispose of it, without in effect hearing the appeal itself, and to do that he must advance it, and hear it out of its turn; and in hearing the appeal out of its turn, an injury, in itself perfectly unavoidable, was done to those suitors, whose appeals had been preferred at earlier stages, and who consequently were entitled to a pre-audience. There may be some reason to think that motions of this description have sometimes been resorted to, having the express object in view of accelerating the hearing of the particular appeal. This may be corrected by the party being compelled to make the motion (to delay the execution of the order, or decree) before the Judge, whose order, or decree is appealed from, and requiring that such motion should be made within a certain limited period, when such Judge, from having a better recollection of the matter, will have the less difficulty in dealing with it; but his deci-

sion on this motion must be final, otherwise the precise evil which is attempted to be corrected, would arise in another shape; namely, in an appeal motion, instead of an original motion. It may plausibly be contended, and possibly be thought, that it is dangerous to entrust the Judge whose decree is appealed from, with this power; but it is unfair to conclude, that feelings so totally unworthy of his high calling, will prevent any Judge filling the elevated office of Master of the Rolls or Vice Chancellor, from the conscientious discharge of his duty. An apprehension to the contrary is an imaginary evil, whilst that which is to be corrected is a real evil, and no other mode of obviating it occurs, so little objectionable, as that suggested; as it is obvious there must be a power somewhere to stay, until the appeal can be heard, the execution of that part of a decree "which extinguisheth a "party's right." (*Ord. Ch. Ed. Beam.* 4).

Prop. 187.] If an issue be directed, and the parties are dissatisfied with the result, an application for a new trial should be made, in the first instance, to the Judge directing the issue. His conscience is the conscience to be satisfied, and, as he is in possession of the merits, he will require less time to dispose of the question.

Prop. 188.] Questions sometimes arise on demurrers to evidence, which, as the practice now stands, if decided by the Master of the Rolls, or Vice Chancellor, may be carried to the Lord Chancellor, and then to the House of Lords. It is difficult to satisfy the mind, that this is a salutary rule, or that the interests of justice require its continuance. The spirit of litigation may, in this instance, very usefully have a limit placed on it, and the time of the court be economised, by providing, that upon these questions the judgment of the Lord Chancellor, the Master of the Rolls, and the Vice Chancellor, as the case may be, shall be final, neither subject to be questioned upon a re-hearing, or upon appeal. There is reason to believe it to have been but comparatively a modern practice, that these interlocutory proceedings could be carried by appeal to the House of Lords, and, it appears to be highly beneficial to follow as far as possible the analogy to the rule of the court of common law, not admitting decisions upon interlocutory matters to be carried to the House of Lords.

In conclusion, it remains to observe, that the Propositions relating to the *Master's Office* are in great measure founded

on the return made by Mr. *Courtenay*, taken in connection not only with the returns made by the other Masters, but also with various suggestions thrown out in the course of the evidence. For reasons well known to the Commissioners at large, those particular Propositions are not adverted to in this paper.

I purposely abstain from all observation in respect of those Propositions which relate to *matters in bankruptcy*.

J. BEAMES

FINIS.

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OF THE

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IN THE

HOUSE OF COMMONS,

ON

THURSDAY, MARCH 9th, 1826,

ON MOVING FOR LEAVE TO BRING IN A BILL FOR THE AMENDMENT OF

THE CRIMINAL LAW,

AND

A BILL FOR CONSOLIDATING

THE LAWS RELATING TO LARCENY.

LONDON:
J. HATCHARD AND SON, PICCADILLY.
1826.

343.094
P. Isol

SPEECH,

&c.

Mr. Speaker,

I hope, Sir, that the House is prepared to give me its attention, whilst I explain the object of those measures connected with the Criminal Law which I am about to submit to its consideration.

To many, I fear, this subject may appear barren and uninviting. It can borrow no excitement from political feelings, nor can it awaken the hopes or fears of conflicting parties; but it involves higher interests, it concerns the security of property—the prevention of crime—the moral habits of the people—and it prefers, therefore, a just and imperative demand on the serious attention of Parliament.

I claim that attention on another ground.

Of all the subjects which fall within the range of our deliberations, none perhaps has been more neglected than the Criminal Law.

Inter arma silent leges, is a trite remark applied to periods of civil dissention. I fear that it might with equal justice be said that amidst the excitement of party conflicts, the true principles which should regulate the Criminal Jurisprudence of the country have been too frequently disregarded.

I conjure the House, therefore, by these high considerations, by the paramount importance of the subject, and by the reparation which is due for past neglect, now to entertain with favour and attention, a proposal for the simplification and amendment of some important branches of the law.

The two measures which I mean to submit to the House, are a Bill for the Consolidation of the Statute Law of England, relating to the Crime of Theft. And a Bill to improve the Administration of Justice in some particulars, which I will hereafter specify.

And first, with respect to the Bill for the Consolidation of the Law relating to Theft.

I presume that I shall not have to combat at

the outset any objections to the principle of an attempt to consolidate and simplify the Criminal Law.

It appears so conformable to the dictates of common sense, that the law, of which all men are supposed to have cognizance—and which all are bound under heavy penalties to obey, should be as precise and intelligible as it can be made—that it is almost needless to fortify by reasoning or authority, the first impressions of the understanding.

If authority were required, I could cite some of the most illustrious names that have adorned the civil and judicial annals of this country, the names of lawyers and of statesmen, who have either expressed a decided opinion in favour of the attempt to simplify the law, or who have been actually engaged in the undertaking.

To one of these, the first in point of antiquity, as the first in weight and esteem, I will refer, and thus preclude the necessity of summoning other less important testimony.

The Lord Chancellor Bacon submitted to King James I. a proposal for amending the laws of England.

In that treatise, short as it is, is comprised every argument that can be cited in favour of

the measure of which I am speaking, every objection is foreseen, and satisfactorily confuted.

The lapse of two hundred and fifty years has increased the necessity of the measure which Lord Bacon then proposed, but it has produced no argument in favour of the principle, no objection adverse to it, which, to use the words of Cowley applied to Bacon himself, "from the mountain top of his exalted wit," he did not anticipate.

The House will allow me to substitute for my own imperfect expressions the emphatic terms in which Lord Bacon has recorded the suggestions of a mighty intellect.

In addressing his Sovereign, he says that his object is not to tax the laws, "I speak," says he, "only by way of perfecting them, which is easiest in the best things: for that which is far amiss hardly receiveth amendment, but that which hath already, to that more may be given."

"Besides, what I shall propound, is not to the matter of the laws, but to the manner of their registry, expression, and tradition: so that it giveth them rather new light than any new nature."

He proceeds to state, that for the safety and

convenience of the proposal which he makes, "it is good to consider and answer those objections or scruples which may arise or be made against this work."

Objection the first, "That it is a thing needless; and that the law as it now is, is in a good estate comparable to any foreign law; and that it is not possible for the wit of man in respect of the frailty thereof, to provide against the uncertainties and evasions or omissions of law."

The following is the answer of Lord Bacon:

"For the comparison with foreign laws, it is in vain to speak of it, for men will never agree about it. Our lawyers will maintain for our municipal laws—civilians, scholars, travellers will be of the other opinion."

But, Sir, I must interrupt my reference to Lord Bacon by remarking that the lapse of years has supplied us with an answer to the first part of this objection which Lord Bacon had not to urge. Foreign nations have condensed and simplified their laws—and have disentitled us to vindicate the confusion or uncertainty of our own statutes, by the boast (weak and fruitless as an argument, if it were well founded) that those statutes are less confused and less uncertain than the ordinances of other states.

"Certain it is," says Lord Bacon, "that our

laws as they now stand, are subject to great uncertainties, and variety of opinion, delays and evasion."—"Mark," he observes, "whether the doubts that arise are only in cases not in ordinary experience, or in cases which happen every day. If in the first only, impute it to the frailty of man's foresight, that cannot reach by law to all cases; but if in the latter, be assured there is a fault in the law."

"There is an inconvenience of Penal Laws obsolete and out of use: for that it brings a gangrene, neglect, and habit of disobedience upon other wholesome laws that are fit to be continued in practice and execution; so that our laws endure the torment of Mazentius.

"The living die in the arms of the dead."

The second objection foreseen by Lord Bacon is this:—"That it is a great innovation, and innovations are dangerous beyond foresight."

He replies, "All purgings and medicines, either in the civil or natural body, are innovations, so as that argument is a common-place against all noble reformations. But the truth is, that this work ought not to be termed or held for any innovation in the suspected sense."

"Besides it is on the favourable part, it easeth —it presseth not—and lastly, it is rather a matter of order and explanation than of alteration."

Another objection stated by Lord Bacon, and that which is perhaps most frequently urged at present, is this:

"That it will turn the judges, counsellors of law, and students of law, to school again, and make them to seek what they shall hold and advise for law—and it will impose a new charge upon all lawyers, to furnish themselves with new books of law."

The reply is—"For the former of these—touching the new labour, it is true it would follow, if the law, (the common law,) were new moulded into a text law, for then men must be new to begin, and that is one of the reasons for which I disavow that course."

"But in the way that I now propound, the entire body and substance of law shall remain, only discharged of idle and unprofitable or hurtful matter, and illustrated by order and other helps towards the better understanding of it and judgment thereupon.

"For the latter—touching the new charge of books, it is not worthy the speaking of in a matter of so high importance—it might have been used of the new translation of the Bible and like works."

Lord Bacon adds this brief sentence pregnant with a truth too often disregarded—a truth of

everlasting and universal application. "Books should follow sciences, and not sciences books."

Having urged these reasons for the simplification of the Statute Law, he lays down the principles upon which it should be conducted.

"For the reforming and recompiling of the Statute Law it consisteth of four parts."

The first, "To discharge the books of those statutes, where the case by alteration of time is vanished; as Lombards, Jews, Gauls halfpence, &c. Those may nevertheless remain in the libraries of antiquities, but no reprinting of them; the like of statutes long since expired and clearly repealed.

"The next is, to repeal all statutes which are sleeping and not of use, but yet snaring and in force; in some of these it will perhaps be requisite to substitute some more reasonable law, instead of them, agreeable to the time; in others a simple repeal may suffice.

"The third, that the grievousness of the penalty in many statutes be mitigated, though the ordinance stands.

"The last is, the reducing of concurrent statutes heaped one upon another, to one clear and uniform law."

Such, Mr. Speaker, are the reasons upon which I have undertaken the measure I shall

propose, and such the principles by which I have guided myself in the preparation of it.

May I not add in the concluding words of Lord Bacon, "this is the best way to accomplish this excellent work; of honour to your Majesty's times, and of good to all times."

If, Sir, there be any to whom the authority of Lord Bacon may appear of too remote an antiquity, or who may consider his views too philosophic and abstract, I will for their satisfaction produce another authority more recent, and more practical—the authority of a Committee of the House of Commons.

In the year 1796, a Committee was appointed to inspect and consider all the temporary laws then about to expire.

The chairman of that Committee was the present Lord Colchester, and to him we are indebted on this, as on many other subjects, for one of the ablest reports that can be found on the Journals of the House of Commons.

That Report observes, "That a general revision of the Statute Law appears to have been often recommended from the Throne—to have been petitioned for by both Houses of Parliament—to have engaged the labours of successive Committees, and to have been undertaken by individuals under the sanction of royal

and parliamentary authority, but never to have been carried forward to any degree of maturity. After the Restoration, Finch, Solicitor-General (afterwards Lord Nottingham and Lord Chancellor), Serjeant Maynard, Mr. Robert Atkyns, Mr. Prynne, and others, were appointed in 1666, to be a Committee, to consider of repealing such Statute Laws as they shall find necessary to be repealed, and of reducing all Statute Laws of one nature, under such a method and head as may conduce to the more ready understanding and execution of such Laws. This seems to be the last recorded instance of this sort. "And thus it is," says the Report, "that Parliament has hitherto failed to accomplish this general revision; and has now suffered it to sleep for more than a century, although the delay of it has annually augmented its necessity."

Now, Sir, what I propose is, to break this sleep of a century; of more than a century indeed, for thirty years have passed away since the Report of 1796, and each successive year has added its own heavy incumbrances to the Statute Book.

I shall, Sir, with the leave of the House present a Bill uniting into one statute all the enactments that exist, and are fit to be retained,

relating to the crime of theft, and to offences immediately connected with theft, such for instance as the receiving of stolen property.

I select the laws relating to theft in the first instance, because I consider the crime of theft to constitute the most important class of crime. There are Acts no doubt of much greater malignity, of a much more atrocious character than the simple act of robbery; but looking to the committals and convictions for crime, it will at once be seen, that those for theft so far exceed the committals and convictions for any other species of offence, that there can be no question of its paramount importance in the catalogue of offences against society, and that, if the laws relating to this class of offence can be simplified and united into one statute, we shall have made a most material advance towards the revision of our Criminal Statute Law.

By a reference to the criminal returns for England and Wales it will be found that in the last year, the year 1825, 14437 persons were charged with various crimes; of this number not less than 12500 persons, amounting to six sevenths of the whole number, were charged with the crime of theft.

There were charged with

Burglary	428
Cattle Stealing	42
Horse Stealing	229
Stealing in a Dwelling-house to the value of forty shillings	265
From the person	835
Robbery on the person on the highway and other places	189
Sheep Stealing	166
Simple Larceny	10087

If any other offence be taken it will be seen that the numbers charged with that offence bear a very trifling proportion to the numbers charged with theft.

In 1825, the same year in which 12500 persons were charged with theft, were committed

For the crime of arson	22
For murder	94
For manslaughter	122

If a longer period be taken the result will be nearly the same.

In the last seven years there have been,

Convictions for forgery	331
For murder	121
For perjury	43
For arson	50

while, for simple larceny alone, there have been

in the same period not less than 43,000 convictions. I need say no more to demonstrate the immense importance of the crime of theft, considered as a class of crime, and to shew the necessity of establishing, with regard to it, as clear and intelligible a law as it is possible to establish.

The number of the statutes at present in force relating to this offence amounts to about ninety-two—they include a period of time extending from the reign of Henry III., from the statute called the *Charta Forestæ*, passed in the ninth year of that King's reign, to the last year of all, the sixth of his present Majesty. The number of these laws, the remote and various periods at which they have passed, will probably create an apprehension that the attempt to simplify their language, to classify their provisions, and to condense them into one statute is a hopeless undertaking. But, Sir, I hold in my hand the visible proof that the undertaking is not hopeless. Here is the draft of a bill which has been printed for the purpose of facilitating the consideration of its details previously to its introduction, and in the short compass of thirty pages, without making any rash experiment to curtail the phraseology of the existing laws, without the omission, I believe, of a single clause, which it is fitting to

retain, are included all the provisions of the statute law relating to the offence of Larceny.

This reduction of the bulk of the law, has been effected by selecting in some instance from an heterogeneous mass of legislation heaped together in one statute upon matters perfectly unconnected and dissimilar, those enactments that relate to the protection of property from theft, and in other instances by extracting from various statutes which have been passed in particular cases, the principle upon which each was founded, substituting in lieu of various scattered enactments, giving protection to individual articles of property, one general enactment, affording protection to the class of property to which those individual articles belong.

It is clear that Criminal Legislation has been heretofore left to the desultory and unconcerted speculations of every man who had a fancy to legislate If an offence were committed in some corner of the land, a law sprung up to prevent the repetition, not of the species of crime to which it belonged, but of the single and specific act of which there had been reason to complain. The new enactment too was frequently stuck into the middle of a statute passed probably at the latter end of a session; to the compounding of which, every man who saw or

imagined a defect in the pre-existing law, was allowed to contribute.

To give an instance or two of legislation of this kind:

Some member has been injured, or he has a constituent who has been injured by the stealing of madder roots, and a provision is forthwith made for the special protection for the future, of madder roots, not by a single statute, but by including the enactments directed against the stealer of madder roots, in a law of which the following is the comprehensive title.

"An Act to continue several laws therein mentioned for granting liberty to carry sugars of the growth, produce, or manufacture of any of His Majesty's sugar colonies in America, from the said colonies directly into foreign ports, in ships built in Great Britain, and navigated according to law; for the preventing the committing of frauds by bankrupts; for giving further encouragement for the importation of naval stores from the British Colonies in America; and for preventing frauds and abuses in the admeasurement of coals in the City and Liberty of Westminster; *and for preventing the stealing or destroying of madder roots.*"

I will mention another instance of the same kind. There are not less than twenty statutes

relating to the preservation of trees from theft or wilful injury, some properly confined to trees alone, others relating to matters so utterly unconnected with the protection of timber, or with the crime of theft, that I shall be almost suspected of fabricating the title of a bill for the purpose of my argument. It seems to have been discovered about fifty or sixty years since that the various laws which had previously passed with respect to timber, did not afford sufficient protection to hollies, thorns, and quicksets, and to save the trouble of amending the former laws—these neglected shrubs were provided for in an Act, which, in taking charge of them, took charge also of the other matters referred to in the following title.

"An Act for the better securing the Duties of Customs upon certain goods removed from the outports and other places to London; for regulating the fees of His Majesty's Customs in the province of Senegambia in Africa; for allowing to the Receivers General of the Duties on Offices and Employments in Scotland a proper compensation; *for the better preservation of hollies, thorns, and quicksets in forests, chases, and private grounds, and of trees and underwoods in forests and chases;* and for authorizing the exportation of a limited quantity

of an inferior sort of barley called bigg from the port of Kirkwall in the Island of Orkney."

Now, Sir, what I propose is not to lessen the security which the law gives to the owner of madder roots, not to throw open the holly or thorn to wanton depredation, but merely to transplant them to a more congenial soil than the province of Senegambia.

The laws relating to trees are fruitful in instances of hasty and slovenly legislation. For instance, there passed in the 6 Geo. III., two statutes for the protection of certain trees and vegetable productions in gardens, the 36th and 48th chapters, which must have passed almost concurrently. Neither of them refer to the host of antecedent statutes, and the author of chapter 48, must have been unapprized of the labours of him who had introduced and probably was superintending at the time the progress of chapter 36; for offences which by that Act are made a felony, are by chapter 48 punishable only with a fine of twenty pounds. Had the latter statute passed in a succeeding Session of Parliament, it would have amounted to a virtual repeal of the preceding Act. There are no less than three separate Acts of Parliament extending the provisions of chapter 48 to particular species of trees.

I will proceed to explain the material points in which I propose either to simplify and consolidate the law, or in which I propose to remedy, what appear to be glaring defects in the law; for my undertaking is not limited merely to the condensation of the statutes. Where I find any omission through which notorious guilt escapes, I propose to supply it—where I find a just principle at present only partially applied I propose to extend it to all the cases which it ought to include. I trust the House will bear with me in this reference to details, because details are here of the utmost importance.

There are on the Statute Book, twelve statutes relating to the offence of stolen goods. They are so numerous, because they are founded not upon some definite principle, but because they refer to individual articles of property. One statute punishes the receiver of stolen lead, iron, copper, brass, and bell metal. Then follows a statute to punish the receiver of stolen pewter. Another refers to jewels, plate, and watches. Then comes the general Act as to all goods and chattels—but even this was not considered general enough to apply to bank notes and negotiable securities, and therefore, an act was passed in the present reign for their special protection. Now, I shall expunge from the Statute

Book all these special provisions, and substitute in lieu of this legislation directed to particulars, one simple and general enactment, founded on this plain principle, that he who receives, knowing it to have been stolen, any thing whatever the stealing of which amounts by law to a felony, shall himself be deemed guilty of felony.

Surely this is the enactment which common sense suggests as the fit enactment against the wilful receiver of stolen property, whether that property be lead or pewter, jewels or bank notes.

The example to which I have last referred will sufficiently explain the mode in which I have attempted to proceed in simplifying and compressing the law in all other cases of a similar nature.

I come now to a subject of at least equal importance. The supplying of those omissions in the law which ensure the impunity of guilt. Of those omissions I will give some examples. Under the law as it stands at present, it has been decided that it is not an offence, at least not an offence in the eye of the law, to rob a ready furnished house, notwithstanding that it is a very serious offence to rob a ready furnished lodging. It is upon record, that after the conviction of a man who robbed of some articles of plate, the

house which he had hired, the sentence was respited upon a doubt whether the case were within the statute which uses the word lodging and not lodging-house. It was agreed by all the Judges that the case was not within the statute, and Chief Baron M'Donald ordered the prisoner to be discharged, saying, "I am sorry the laws of England have not provided for your case, for I have no doubt whatever of your guilt."

Again, the statute which makes it an offence to steal or destroy fish in streams, expressly refers to such streams as pass in or through an estate. If therefore the stream, as is frequently the case, neither passes in nor through an estate, but passes between two estates, being the boundary to each, the owner of the fish forfeits his protection under the statute.

Can any man doubt that these are examples of imperfection and omission in the law, which can and ought to be supplied?

Can any man doubt that it is expedient to extend, as I propose to extend, the protection which the law at present gives to securities for property in the British funds, to securities for property in the funds of foreign states, and to mercantile instruments of all kinds, entitling the holder to the payment of money abroad? Is it fitting that these securities, and instruments

should be liable to be stolen with impunity? Is it fitting that the stealing of a handkerchief should subject to transportation, and that the stealing of title-deeds, that the stealing of a will on which the property and existence of whole families may depend, should remain altogether exempt from penalty?

The law with respect to a very frequent and very aggravated offence, the embezzlement by servants of their master's property, is at present very defective.

Among the principal defects are these:

It is necessary to state in the indictment, and to prove in evidence the embezzlement of specific monies, not merelyof the sum in the gross of which the master may have been defrauded, but of the particular coin or notes of which that sum consisted, which may have entirely escaped the recollection of the master.

Again, if the servant has defrauded his master by the means of receiving change, he cannot be convicted at all. Supposing, for instance, the servant having ten shillings to receive for his master, gives ten shillings to the party from whom the money is due, and receives a one pound note, which he embezzles, he commits no offence against the law. He cannot be convicted of

embezzling the note, for that was not the property of his master, nor can he be convicted of embezzling shillings, for he has received none.

The main defect in the law is this: the offence is at present a felony; now by the rules of law each act of embezzlement is considered a distinct felony, and only one distinct felony is admitted to be proved upon an indictment for felony. The prosecution therefore often fails from the impossibility of laying the whole case, the whole tissue of fraud before the jury. The proof being confined to a single act of embezzlement, the jury leans not unreasonably to mercy, and frequently chooses to presume that the single act of embezzlement may have arisen from mistake, rather than to convict for the felony.

I propose to remedy these defects; to admit proof that various sums have been received and misapplied by a prisoner, without requiring proof as to the specific coin or bills of which those sums consisted. I propose to alter the legal designation and character of the crime of embezzlement, to make it a misdemeanour, instead of a felony, and thus to admit the proof of that which may be absolutely necessary to enable the jury to determine the real extent of the prisoner's guilt, namely, of the whole series

of embezzlement, in which he may have been engaged.

In the course of the observations which I have made, several cases have been mentioned in which I propose to subject to penalties, acts which at present may be committed with impunity.

But I beg to observe first, that these acts are in every instance acts of great moral guilt, which only escape at present through the imperfection of the law; and secondly, that the new penalties which I affix, amount in no case whatever to death; I constitute no new capital felony.

I propose to extend the grasp of the law, but in no instance do I increase; in some I mitigate its severity.

I will mention two important examples of the abatement of penalty.

The law which makes it an offence punishable with death to steal in a dwelling-house to the amount of forty shillings, extends at present to all out-houses within the curtilage, as it is called.

It is intended to except for the future from the operation of this law, so far as regards capital punishment, the stealing in all out-houses which are not connected with the dwelling-house by some internal communication.

Another case in which it is proposed to reduce the penalties of the law, arises out of an Act of the last Session of Parliament, which makes the robbery of gardens, without any distinction of circumstances, a transportable felony. The severity of the penalty renders this law in many instances inoperative. It is paralyzed by the stronger law of humanity and reason, which tells a man to overlook altogether the offence of the school-boy who robs an orchard, more perhaps from a wanton spirit of enterprize than from vice, rather than consign him to a prison and indict him for a felony.

We shall give more effectual protection to the owner of this species of property, if while we retain the severer penalties for all cases of aggravated delinquency, we empower a magistrate to hear the complaint, and if he shall think fit, to dismiss the offender for the first offence on payment of a reasonable fine.

I have now detailed the leading objects contemplated by the Bill for consolidating the Laws relating to Larceny, or I should rather say, I have given such examples of those objects as will enable the House to understand the general scope of the measure.

I will now proceed to explain the outline of the other, and not less important Bill, which is

intended to effect improvements in the administration of the Penal Law generally.

It is impossible, Sir, to contemplate without painful reflections, the state of this country with respect to the number and the increase of criminal offences. It is useless, it is worse than useless, to conceal from ourselves the truth that there is not in this country that security from fraud and depredation which there ought to be in a well-constituted society: and that there has been of late years a rapid and alarming increase in the amount of that species of crime.

Many causes may concur to swell the amount of crime in this country, as compared with the amount of it in some other countries of Europe.

Property in this country is much greater, more generally extended, and necessarily more exposed. The freedom of action which is allowed to every man by our law, the absence of any controul upon that action through the medium of police establishments, like those which exist in many countries, empowered to act upon vague suspicions, and preventing by unceasing vigilance the commission of offences that would otherwise be completed—such causes no doubt contribute in many instances to favour

the early stages of vice in this country. But while I notice their existence and their effect let it not be supposed that I am blind to the greater good which counterbalances the evil, or that it is my purpose by rash attempts at controlling the excesses which this freedom of action may engender, to impair the noble spirit, the enterprize and energy, that are its blessed offspring.

I shall now proceed to submit to the House a few details with respect to the comparative numbers of criminal offenders at different periods, and I deeply regret that the result is in some particulars so unsatisfactory.

In the seven years, ending December 1816, there were committed to the several gaols in England and Wales 47522 persons charged with criminal offences.

In the seven years, ending December 1825, the number was nearly double, amounting to 93718.

In the former period there were 29361 convictions. In the latter 63418.

In the former period there were sentenced to death 4126 persons. In the latter 7770.

In the former period 536 persons were executed. In the latter period 579; being an immense

reduction, let it be observed, in the number of executions as compared with capital convictions.

It is a circumstance worthy of remark, that although in the country generally there would appear by these returns to have been so large an increase in the amount of crime, in the last of the two periods to which I have been referring, an increase nearly of one half the total amount, there has been by no means a corresponding increase in the number of criminal offenders in London and Middlesex, although in this district the increase of the population must have been at least as great as that in any other district.

Taking the more serious offences, those to which the penalty of death is attached, we shall find that in London and Middlesex 1018 persons received sentence of death in the seven years ending December 1816.

In the seven years, ending December, 1825, 1124, being an increase in capital offences of not more than one eleventh.

The total number of convictions generally in the first period was 7421. In the latter period 11624.

If reference be made to the number of executions in London and Middlesex in late years,

compared with former periods, I trust we shall be warranted in concluding that crimes of an atrocious character are on the decrease, though no doubt the reduction in the number of executions must be partly attributed to a greater forbearance in carrying into effect the extreme punishment of the law.

In seven years, ending with December, 1793, there were in London and Middlesex 272 persons executed.

In the same period ending with December, 1825, there were 165.

In two years alone 1786 and 1787, there were 138 executions for offences committed in London and Middlesex.

In the three last years there were only 39.

From the year 1810 to the year 1822, inclusive, there were 173 executions in England and Wales, for robbery on the highway, being at the rate of about fourteen in each year.

In 1823, there were five executions for this offence. In 1824, six. In 1825, six.

For the seven years preceding 1823, the number of convictions for this last offence, were at the rate of 140 in each year. In the last three years they have not exceeded on the average 110.

From the year 1810 to the year 1822, inclu-

sive, there were 260 convictions in England and Wales for murder, being at the rate of 20 in each year.

In the year 1823, there were 12 convictions for murder; in 1824, seventeen; in 1825, twelve.

I trust, therefore, that although there has been so great an increase in late years in the total amount of committals for crime, I am warranted in the inference that crimes of the deepest die are less frequent than they formerly were, and that they are gradually decreasing in number.

With respect to the fact that crime has not increased in London and Middlesex, in the same proportion in which it has increased in every other district of England, almost without an exception, I cannot but think that the cause of this is chiefly to be looked for in the efficiency of that police establishment, which is placed under the superintendence of the Secretary of State, an establishment consisting merely of magistrates, with no higher authority than that which any justice of the peace possesses — of constables and patrol, with no other powers than those which the common constables can exercise, but efficient and active because their whole time is devoted to the duty which they have to perform, and because a responsibility is imposed upon

them, which it is very difficult to impose practically upon the gratuitous discharge of public functions.

I am confident that the House will not require an apology for these general observations on the nature and extent of the criminal offences committed in this country, with which I have prefaced the explanation I will now give of the particular objects of the second measure which I propose to introduce, and which I trust I do not improperly designate a Bill to improve the Administration of the Law.

This bill will regulate in some respects the proceedings connected with the administration of the law, in the various stages of a criminal prosecution. It will re-enact, and more clearly define the duty of the coroner as to taking evidence upon an inquisition of manslaughter or murder—the binding by recognizance—and the certifying of the evidence, the recognizances and the inquisition, to the court before which the trial is to be.

In respect to the magistrate—it will define what is generally understood to be the law as to the power of admitting to bail, which now rests upon the construction of an obscure statute passed in the reign of Edward I.

It will make it obligatory on the magistrate

to do that, which it is the general practice to do in case of felony, (but a practice not enjoined by law,) namely, to take the examinations upon which a prisoner is either committed to prison, or admitted to bail, in the actual presence of the prisoner himself. It will extend this obligation to cases of misdemeanour, as to which there is at present no provision by law, and it will require the return of examinations to the quarter sessions, to which they are not at present by any existing statute bound to be returned.

It will extend to subsequent and to future acts the principle of an Act of King William, which places the felon in the same situation as to the consequences of his guilt, whether that guilt be proved by evidence—or confessed by himself—or admitted by his standing willfully mute—or by his suffering outlawry. At present, there are several offences, constituted such by Acts of the Legislature which have passed subsequently to the Act of King William, in the case of which, the same consequences do not follow to the offender, should he confess his guilt, or stand wilfully mute, as would follow in the case of his conviction by verdict upon evidence.

This bill will extend to accessaries to felony after the fact, the principle of the existing law, which makes accessaries before the fact triable,

either in the county in which the principal felony was committed, or in the county in which the offence of becoming an accessary was committed. The propriety of such an enactment will be best shewn by referring to circumstances which recently occurred connected with a very aggravated burglary in the county of Hertford.

Lord Cowper's house was broken into by night by a gang of eight persons, who went from London for the purpose, and his steward was robbed of the amount of the rents which he was known to have received from Lord Cowper's tenants the day before.

The booty was brought to London, and was divided into shares by a man of the name of Dudfield, who received a considerable portion of it, and who, though not himself present at the robbery, was no doubt actively concerned in planning it. He was apprehended and sent to Hertford for trial, but it was impossible to convict him there, because there was no proof that the offence with which he was charged, namely, that of being an accessary after the fact, had been committed in that county in which the principal offence had been committed. He was next arraigned at the Old Bailey, but he escaped there on the same ground. Ultimately he was convicted in Surrey after very great

difficulty, and at an expense to the prosecutor of four hundred and twenty-six pounds for bringing that single offender to justice.

Should this bill pass into a law, the prisoner indicted under similar circumstances would be liable to be tried in Hertfordshire as well as in Surrey.

By this bill a discretionary power will be given to the Judges of assize and to the court of quarter sessions to award to the prosecutor in certain cases of misdemeanour the actual expences incurred by him.

On a trial for felony it is well known that the courts have such a power at present, and experience proves that the total want of it on trials for misdemeanour, is a serious obstacle to the due execution of the law. I am fully sensible that this power ought to be strictly defined and controlled. It ought not to extend to cases of assault on account of the tendency it might have to encourage a litigious spirit and frivolous prosecutions, and it might probably be expedient to limit it to prosecutions for those offences to which the punishment of hard labour can be by law attached. I will give the fullest consideration to every suggestion for preventing the abuse or the injurious effects of this extension of the authority of courts of justice, but I

must contend that by withholding the authority altogether, you frequently close the avenues of justice in instances in which the poorest classes are the sufferers, and in which the public interest loudly demands reparation from the offender.

What distinction in point of moral guilt, nay in many cases what distinction in point of injury to the sufferer, is there between actual rape and the attempt to commit rape? The law calls the latter offence a misdemeanour, it expects that the party aggrieved, the infant child perhaps of a labouring man, shall overcome all the natural feelings of delicacy and shame, and shall appear in a public court to prove the disgusting details of the injury she has received; it requires the sacrifice of time, the trouble which are inseparable from public prosecution, and after all, inflicts on the injured party the heavy penalty of paying the whole expences of the suit. There may no doubt be occasionally subscriptions towards such expences from private and casual sources, but the public purse is closed by law to the prosecutor in such a case as that which I have been detailing.

Take again the case of gross abuse of authority, or gross neglect of duty, by some public officer, amounting to misdemeanour, Can we expect that private individuals will take upon

themselves the invidious duty of lodging the complaint, the painful task of arranging the proofs, and finally the whole costs of prosecution, and all this out of a pure abstract love of justice and tender care for the public interests?

It is ridiculous to expect it; to withhold public aid from the prosecutor in such instances as these, amounts to the frequent denial of all reparation to the poor man, and to the impunity of great offenders.

My attention was drawn to the last instance which I have mentioned of imperfection in the law, by a gentleman whose name will be familiar to all who hear me, the Reverend Mr. Sydney Smith, a magistrate of the county of York. He had committed a man on the charge of poisoning cattle; the man's house was searched by a constable, who found there the poison (arsenic), brought it to the house of Mr. Smith, and subsequently to screen the prisoner from punishment denied that any poison had been found. The constable confessed the part he had acted in this transaction, and yet the magistrate had no alternative but either to permit such flagrant misconduct to go unpunished, or to take upon himself the whole burden of the prosecution.

Either alternative appears to me fraught with injustice for which I hope to devise a remedy.

Perhaps in my own opinion a more extensive remedy ought to be applied than that which I am at present prepared to apply. But such a remedy might work a change in our institutions and habits too material to be hastily adopted, without feeling our way by the aid of that previous discussion which familiarizes the public mind to changes, that may be good abstractedly considered, but that lose half their benefit, if they are too precipitately carried into effect.

If we were legislating *de novo*, without reference to previous customs and formed habits, I for one should not hesitate to relieve private individuals from the charge of prosecution in the case of criminal offences justly called by writers upon law—Public Wrongs. I would have a public prosecutor acting in each case on principle, and not on the heated and vindictive feelings of the individual sufferer on which we mainly rely at present for the due execution of justice. Such feelings are rarely the fit measure of the propriety of prosecution. They are apt on the one side to overrate the wrong committed; on the other, still more apt to subside after the first impulse of revenge,

and coupled with the just fear of trouble and expence, to lead to disgraceful compromises in which the interests of justice are altogether overlooked.

I would therefore make the prosecution of these public wrongs much more a matter of public concern than it is at present, I would (taking at the same time all proper security against the encouragement of undue litigation) indemnify parties more liberally from the pecuniary charge which the trial of a public offender entails, and I would by the appointment of a public prosecutor guard against malicious or frivolous prosecutions on the one hand, and on the other, I would ensure prosecution in cases in which justice might require it.

In Scotland crimes are prosecuted in this manner through the agency of a public officer, responsible for the justice and propriety of the prosecution when undertaken at the public charge, and for the conduct of it through its various stages.

The public prosecutor in Scotland has another power devolved upon him—the exercise of which is frequently of the utmost advantage. In the prosecution of a crime, to which the penalty of death is attached by law, he is enabled in preferring the indictment, or indeed any subsequent

stage of the trial, to restrict the sentence in case of conviction to a punishment short of death, thus empowering the jury to find a verdict of guilty with a perfect assurance that the death of the prisoner cannot be the consequence of that verdict.

Whether such a power can be safely and properly transferred to the institutions of our own country, I am not now prepared to give an opinion. Of this, however, I am confident that if it should be found possible to borrow from the laws of Scotland suggestions for the improvement of our own law, no Englishman would be found to decry the adoption of such suggestions as monstrous innovations, the offspring of a ridiculous desire for useless uniformity, and the badges of disgrace to the country for whose benefit they were intended.

In the detail of the chief provisions of this bill, I have reserved for the last, that alteration in the existing law to which I attach the greatest importance.

It appears to me, Sir, that when a prisoner charged with a heinous crime, and proved to be guilty on clear evidence, escapes the penalty of the law upon some technical quibble, or in consequence of some omission of useless forms, a grievous injury is done to society. Not only is

justice defeated in the particular case, but the law is discredited, and the numerous class that speculates keenly on the advantages to be derived from crime, compared with the risk of its punishment, sees in every instance of undeserved impunity a fresh encouragement to the adventure. They may, and probably they do, grossly miscalculate—but what is that very circumstance, but a great additional evil to society?

It is surely a gross mistake to boast as the perfection of any system of law, that it favours the escape of the party accused.

That law I apprehend to be most perfect, which most certainly ensures the conviction of the guilty man, and the acquittal of him who has been unjustly accused. But the acquittal of the innocent ought, in justice to innocence, to be upon the merits of the case. The innocent man derives no benefit from the advantage which may be taken of mere informalities; on the contrary, if that advantage be taken in his case, he forfeits, perhaps, the only chance he has of rescuing his character from stigma, by the proof in open court, that the charge against him is totally unfounded.

When I say that the law is most perfect which

ensures with the greatest certainty the conviction of the guilty and the acquittal of the innocent, I ought to add as a qualification, that the law ought to ensure that conviction and acquittal upon principles not capable of being misapplied and perverted.

There are, for instance, provisions in the Criminal Law of France, calculated no doubt in individual instances to elicit truth, but which I should never wish to see ingrafted on the practice of this country.

I should deprecate anything approaching to the compulsory examination of an accused party, above all, I should be unwilling to see the judge who presides at a criminal trial, actively concerning himself in the conduct of that trial. I should fear that the general tendency of such an interference would be, if not to create in the mind of the judge by insensible degrees, a leaning in favour of the accusation rather than the defence, at least, to lead to inferences on the part of the jury as to the impressions of the judge, which might unduly influence their verdict.

I should deprecate the temptation which it might create to the display of superior acuteness in the examination of evidence, every thing in short, which could give to the judge the charac-

ter of a party to the cause, rather than that of a perfectly unbiassed arbiter.

To return, however, to the immediate object to which I wished to call the attention of the House, namely, the expediency of devising some means, which, at the same time that they in no degree endanger the security of the person unjustly accused, shall diminish the chances of escape to the guilty man through mere quibbles or useless technicalities.

If any one will review the grounds upon which great offenders, of whose guilt there could not be a question—whose guilt had been proved in evidence—nay, upon whom a verdict—upon whom even judgment itself had passed—have still escaped punishment; he cannot rise from that review without lamenting such melancholy triumphs of legal forms over substantial justice.

Ought notorious guilt to be entitled to the same impunity with proved innocence, because, after judgment it is discovered, (to quote the phrases of this bill, which I have had prepared,) that in the indictment for a felony there is wanting some proper addition to the name of the defendant, or because there is the want of a *profert*, or *prout patet per recordam*—or because there is the omission of *vi et armis et contra*

pacem? Yet these are the grounds upon which offenders have escaped.

Ought the murderer to have all the benefit of acquittal, because the murdered man had three Christian names, and only two of them are set forth in the indictment? or because the wound which caused his death is not described with entire accuracy?

Surely we may rely on the dictates of common sense, and be assured that these things are not perfections in the law. But if I am called upon for professional authority, I will cite the beautiful expressions of Sir Matthew Hale, and let them stand as the fitting preamble to the enactment I propose.

In the History of the Pleas of the Crown, Sir Matthew Hale concludes the chapter on the forms of indictment with these memorable remarks:

"And thus far, touching the forms of indictment, wherein generally we are to take notice that in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many times

gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonour of God. And it were very fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy."

In the bill which I had prepared for the purpose of applying this timely, or I should rather say, this tardy remedy, it was originally proposed to enact that if upon any trial for felony or misdemeanor, the jury shall be satisfied that any person, time, fact, matter or thing, touching which evidence is given, is really the same person, time, fact, matter, or thing intended by the indictment, it shall be lawful for the jury to find the defendant guilty, notwithstanding any variance in the name or description contained in the indictment.

It was thought, however, by some whom I consulted, and in whose judgment I place implicit confidence, that this enactment goes too far, and that it might introduce a laxity and uncertainty into indictments more mischievous than the excessive subtilty which it is intended to correct. I shall propose, therefore, to limit the

enactment, at least for the present, to a specification of those defects which shall not (as at present they do) vitiate an indictment after verdict, or after confession or default.

I have now, sir, I fear, at very unreasonable length, detailed the objects of the two measures which I propose to introduce.

They may not perhaps answer the expectations of some who call out for the immediate and simultaneous revision of the whole of the Criminal Law.

To those I answer, in the first place, that they are little aware of the difficulties of far less extensive projects, of the labour and caution, and judgment which are requisite in every step of such an undertaking as that to which the present motions refer.

The mere collection of dispersed statutes under one head is an easy process, compared with the more important task of rejecting what is superfluous, clearing up what is obscure, weighing the precise force of each expression, ascertaining the doubts that have arisen in practice, and the solution which may have been given to those doubts by decisions of the Courts of Law.

In the second place, I answer, that nothing would be more unwise than to force on the country in too rapid succession, these alterations in

the law. Even if we could have an entire confidence, that the substituted law was in itself perfect, without a blemish or omission, still we must recollect, that we are not the instruments for carrying it into effect, and we shall defeat our intentions, and blight the prospects of real improvement, unless we give leisure to the various authorities on whose assistance we must depend; nay, to the country generally, to comprehend the full scope of the projected changes. Let us not distract and confound society by a muliplicity of new arrangements relating to matters of such importance, and of such constant recurrence in the daily business of life.

It cannot, I think, be justly said, that of late years at least, the march of amendment in the law has been too slow.

During the four years that I have held the appointment which I now hold, the following measures have been carried through Parliament:—

The whole of the Statute Law relating to Prisons, and Prison discipline has been, after deliberate inquiries, commenced by my predecessor (Lord Sidmouth), consolidated and amended.

The severity of the Criminal Law has been mitigated by extending the benefit of clergy to

many offences that, before, were capital felonies; and one great objection to that severity has been altogether removed, by enabling the judges to abstain from passing sentence of death in every case, excepting that of murder.

The laws relating to the punishment of transportation have been revised and collected into one statute.

The laws relating to the effect of pardons from the crown, and to the rights of convicts after pardon, and after the fulfilment of their sentence, have been placed upon just principles.

The abuses that grew out of the practice that prevailed with regard to Writs of Error have been corrected. And lastly:—The Jury Act, comprizing the regulations that were previously dispersed in sixty-six Acts of Parliament, which now no longer encumber the Statute Book, has been passed, and has, I have every reason to believe, materially improved the constitution of juries.

I have entered into this detail of what has been actually done, for the purpose of satisfying the House, that there is no indisposition on my part to proceed in the review and improvement of institutions connected with the administration of the Criminal Law, though I certainly deprecate that rapid progress, which is inconsistent

with mature deliberaation, and which leaves behind it, in its thoughtless career, the various instruments, without whose concurrence it is useless to advance.

There may, Sir, perhaps be some who may think it extraordinary, that I, who have not had the advantage of professional practice, or even of a legal education, should undertake the introduction of measures, the details of which must necessarily require so much of professional and technical learning, But let it be recollected, that I am placed in an office which devolves upon me the duty of superintending, in many important respects, the administration of justice, which entitles me to advise the Crown as to the remission or execution of almost every sentence of the law, and which gives me daily, I might say, hourly opportunities of witnessing the practical operation of the statutes which I am attempting to simplify and amend. These considerations will probably relieve me from the charge of any unwarranted and presumptuous interference in matters which I do not comprehend.

I should be indeed open to that charge, if in presenting these Bills to the House, I were offering my own crude speculations, unaided

by the learning and experience of professional men. No, Sir; it has been my good fortune to profit by the willing assistance of men who yield to none in respect to general acquirements, to profound knowledge of the principles of law, or to experience in its practice. I owe the preparation of these Bills to those Gentlemen through whose labour and skill the Jury Act of last session was prepared; to Mr. Hobhouse, the Under Secretary of State in the Home Department, (to whom, but for the relation in which he stands to me, I would do much more ample justice); and to Mr. Gregson, a barrister of high eminence on the Northern Circuit, justly respected by all who know him. The Bills, thus prepared, have been submitted to all the Judges, and from many of those eminent individuals, from Mr. Justice Bailey, Baron Hullock, Mr. Justice Holroyd, Mr. Justice Burrough, and Mr. Justice Gaselee, I have received very useful suggestions. The assistance which has been afforded by the Lord Chief Justice, I cannot sufficiently acknowledge. He has devoted to the minute examination of these measures all the leisure which he could spare from the immediate pressure of his judicial duties; and has, I fear, encroached upon that repose

which was essential to the restoration of his health.

In the profession of the law generally, I have found the utmost readiness to co-operate in the work which I have undertaken. It is the fashion to impute to that profession an unwillingness to remove the uncertainty and obscurity of the law, from the sordid desire to benefit by its perplexity. This is a calumny which I know to be unfounded; for I have never made, in the progress of this work, a single application for assistance to any member of the profession of the law, which has not been received in the spirit which becomes a generous mind, rising above the narrow prejudices of habit, and the paltry view to private gain. There is one gentleman among those who have thus shewn a willingness to give assistance—to whom I must make this public return of my acknowledgments, I allude to Mr. Russell, a gentleman who has rendered important service to the law by most valuable publications, and who has offered suggestions with respect to many provisions included in these Bills that are entitled to every attention.

I now leave to the consideration and decision of the House, the measures into which I have entered at such unreasonable length. They will,

I trust, be found, after full investigation, not unworthy of the final sanction of Parliament.

They propose no encroachments upon civil liberty, no extension of executive authority, no rash subversion of ancient institutions, no relinquishment of what is practically good, for the chance of speculative and uncertain improvement. "The work which I propound," as Lord Bacon says, "tendeth to pruning and grafting the law, and not to plowing up and planting it again; for such a remove I should hold indeed for a perilous innovation."

Whatever, Sir, may be the ultimate decision of this House, with respect to the measures themselves, it will not, I am confident, condemn the motives which have prompted me to the undertaking.

I can have no motive, but the desire to improve the opportunities which have been placed within my reach, and to exert to useful ends, the influence and authority which constitute, if rightly applied, the real value of high official station.—And, Sir, if there be mixed with that desire any latent feeling of a more personal nature, why should I disavow the legitimate ambition, to leave behind me some record of the trust I have held, which may outlive the

fleeting discharge of the mere duties of ordinary routine, and that may, perhaps, confer some distinction on my name, by connecting it with permanent improvements in the judicial institutions of the country?

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